

UNITED STATES OF THE UNITED STATES

IN SENATE

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REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR 1891

ALBANY: JAMES B. LEECH, AND THE NATIONAL
EDUCATIONAL ASSOCIATION, 1891.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 571.

EMMA F. DOEPEL ET AL., HEIRS AT LAW OF HOLLIN H.
FEARNOW, DECEASED, PLAINTIFFS IN ERROR,

vs.

LUTTIE B. JONES, ELMER JONES, AND THE PHOENIX
MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1

1st Subdivision.

(Filed Aug. 8, 1912. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma, Supreme Court
Commission, Division No. One.

No. 1930.

EMILY F. FEARNOW et al., Plaintiffs in Error,

vs.

LUTTIE B. JONES et al., Defendants in Error.

Syllabus.

1. Under a statute (Wilson's Rev. & Ann. St., sec. 3483), declaring a marriage between certain relatives to be "incestuous, illegal and void," and a statute (Wilson's Rev. & Ann. St., sec. 2276) punishing such a marriage by imprisonment in the penitentiary, a marriage between persons within the prescribed degrees is void, and not merely voidable.

2. In an action by the heirs of a deceased entryman, against one claiming to be his widow, to declare a resulting trust after she has procured the issuance of patent under sec. 2291 of the Revised Statutes of the United States relating to homesteads, where the heirs have properly preserved their rights before the land office, and where it is alleged that the marriage is a nullity and that, therefore, the person claiming the land is not the widow of the entryman, the nullity of the marriage may be asserted.

3. In an action to declare the patentee of a homestead a trustee for the real owners, when it is apparent that the land office has erred in the application of the law to the facts, and where the contestants have preserved their rights before the land office, a resulting trust will be declared.

Error from the District Court of Kay County. W. M. Bowles, Judge.

Action by Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow, as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, infants, plaintiffs below, plaintiffs in error, against Luttie B. Jones, Elmer Jones, R. C. Fearnow and The Phoenix Mutual Life Insurance Company, a corporation, defendants

in error, defendants below. Judgment for defendants and plaintiffs bring error. Reversed and remanded.

L. A. Maris, attorney for plaintiffs in error.

J. F. King, attorney for defendants in error.

AMES, C.:

The trial court sustained a demurrer to the plaintiffs' petition, and this proceeding is brought to review that ruling. The facts alleged in the petition are, that one Hollen H. Fearnow, on March 29, 1899, made a homestead entry upon the land involved; that he thereupon took possession of the land, resided thereon, cultivated it and made improvements for a period of more than five years and until his death in October, 1905; that in November, 1906, one Luttie B. Jones, one of the defendants, claiming to be his widow, relinquished his homestead entry, filed her homestead entry upon the same land, and subsequently secured patent therefor; that in December, 1906, the plaintiffs filed their contest affidavit before the land office, alleging that Luttie B. Jones was not the widow of Hollen H. Fearnow. The facts alleged in this respect are, that Luttie B. Jones and Hollen H. Fearnow were residents of the Territory of Oklahoma in August, 1901; that at that time they were first cousins by blood; that they went to Kansas, where a marriage ceremony was performed; that under the laws of Kansas, as well as those of Oklahoma, this marriage was incestuous and void; that immediately they returned to the Territory of Oklahoma; and that Mrs. Jones' right to relinquish Fearnow's entry rested entirely upon this void marriage. In January, 1907, the land office at Guthrie rejected the contest for the reason that it would not inquire into the validity of the marriage. Appeal was taken to the Commissioner of the General Land Office, where the decision was affirmed. Appeal was then taken to the Secretary of the Interior, where the decision of the Commissioner was affirmed. Thereafter, when patent had issued to Mrs. Jones, the heirs of Fearnow brought this suit to declare a resulting trust. The statute of Kansas in force at the time of this marriage, provides:

"All marriages between parents and children, including grand parents and grand children of any degree, between brothers and sisters of the one-half blood as well as the whole blood, and between uncles and nieces, aunts and nephews, and first cousins, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations."

The law of Oklahoma then in force provides (Sec. 3483, Wilson's Rev. & Ann. St.).

"Marriages between parents and children, ancestors and descendants of any degree, of a step-father with a step-daughter, step-mother with a step-son, between uncles and nieces, aunts and nephews, between brothers and sisters of the half as well as the whole blood, father-in-law, mother-in-law and son-in-law and first cousins are declared to be incestuous, illegal and void, and are expressly prohibited."

Section 2276 of Wilson's Rev. & Ann. St., is as follows:

"Persons who, being within the degrees of consanguinity within which marriages are by the law of the Territory, declared incestuous and void, intermarry with each other, or commit adultery or fornication with each other, are punishable by imprisonment in the Territorial prison not exceeding ten years."

The questions which arise in the case are whether this widow is entitled to the homestead of Fearnow, or whether the plaintiffs, his heirs, are entitled to it.

It will be remembered that Fearnow had resided on the land more than five years prior to his death. Although he had not made his final proof, he had resided upon the land long enough to entitle him to make it. "The right to a patent once vested is treated by the government, in dealing with public lands, as equivalent to a patent issued." *Stark vs. Starr*, 6 Wall. 402, 18 L. Ed. 925; *Hays vs. Wyatt*, (Idaho) 115 Pac. 13, 16. Sec. 2291 of the Revised Statutes, providing for the disposition of a homestead entryman's rights upon his death, is as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

It will thus be seen that if Mrs. Jones is the widow, she is entitled to the land, while if she is not the widow, his other heirs would be entitled to it.

It is apparent that if she was not the widow she had no right to relinquish Fearnow's entry, and that she could acquire no right against his heirs by relinquishing and entering the land herself, as

4 by the statute the heirs had two years within which to make proof, and during that time she could not acquire any rights adverse to them. *The Atchison, Topeka & Santa Fe Railroad Company vs. Frederick Pracht*, 30 Kan. 66. It is likewise true that if the land department committed error of law, that the courts will declare a trust where the true beneficiaries have protected their rights before the department. *Baldwin vs. Keith*, 13 Okla. 624; *Ross vs. Stewart*, 25 Okla. 611. The propositions involved in the case, as stated by the defendants, are as follows:

"First. To put it in its strongest light for plaintiffs in error, the marriage is voidable and not void, and therefore it could not be attacked collaterally as was attempted in this action.

"Second. That even though the marriage was void and not voidable, it legally could not be inquired into or determined as an incident to another cause of action—in this case to declare a trust.

"Third. That as the land department found the facts to be that these plaintiffs in error never made application to have the homestead entry of Hollen H. Fearnow (whose heirs they claim to be) to this land reinstated or done anything to initiate or establish any right to or interest in this land, they are in no position to question, and they cannot question, the right or title to it in Mrs. Jones."

In our opinion this marriage is void, and not merely voidable. The law of Kansas, where the marriage was consummated, declared it to be "incestuous and absolutely void." The law of Oklahoma, in which the parties both resided, declared it to be "incestuous, illegal and void," and provided that it should constitute an offense "punishable by imprisonment in the Territorial prison not exceeding ten years." Incest is intercourse between people related within the degrees prohibited, and it seems clear to our minds that it was the purpose of the legislature, in declaring such marriages incestuous and absolutely void, and providing that the relation should be punishable by imprisonment for ten years, to prevent such marriages, and that it did prevent them, and that any marriage pretended to be consummated in violation of these statutes is, as declared by statute, not only void, but incestuous. In *Hunt vs. Hunt*, 23 Okla. 490, 100 Pac. 541, it was held that a marriage between a boy under eighteen and a girl under fifteen was voidable and not void, although it was prohibited by statute, but in that case the statute did not declare the

marriage to be "incestuous, illegal and void." The section
5 there construed was 3484 of Wilson's Rev. & Ann. St., and immediately follows section 3483, which is now under consideration, and the concluding proviso of sec. 3484 lends weight to the conclusion which we reach with reference to sec. 3483. It is as follows: "Provided, That this section shall not be construed to prevent the courts from authorizing the marriage of persons in settlement of suits for seduction or bastardy, when such marriage would not be incestuous under this act," thus indicating that marriages prohibited as incestuous by section 3483 would not be recognized or tolerated in the state under any circumstances, even in settlement of suits for seduction or bastardy. We recognize the danger of undertaking to lay down a general rule, but it seems to us that it is not far wrong to say that a marriage may be considered voidable when it is possible under any circumstances for the plaintiffs to contract the marriage, or subsequently to ratify it, while it should be considered void if it is impossible for them under the law to contract it, and if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that it is void. As said by the court in *State vs. Yoder*, 130 N. W. 10 (Minn.) "And in this connection it may be safely said that a marriage is not absolutely void in any case not expressly so declared by law, when by the subsequent conduct of the parties it may be ratified, confirmed, or made valid by cohabitation." Our conclusion that the marriage in this case is void is supported by the following decisions: *Blaisdell vs.*

Bickum, 139 Mass. 250; Lanham vs. Lanham, 136 Wis. 360; Wilbur's Estate vs. Bingham, 8 Wash. 35, 35 Pac. 407; Moore vs. Moore, (Ky.) 98 S. W. 1027; Hayes vs. Rollins, (N. H.) 44 Atl. 176; In re Gregorson's Estate, (Cal.) 116 Pac. 60.

The next proposition stated by counsel for the defendant is, that even though the marriage is void, its validity cannot be inquired into in this proceeding seeking to declare a trust.

If this were true, it would follow that this woman, notwithstanding the fact that she was not the lawful widow of Fearnow, could keep this land without the fact of her relation to him being inquired into by any tribunal. The land office has declined to make inquiry into the fact, and if the courts should likewise refuse, then the heirs, who are in law entitled to the estate, would be deprived of it without having their day in court. In *In re Gregorson's Estate*, (Cal.) 116 Pac. 60, 62, it is said in the opinion:

"A marriage prohibited as incestuous or illegal and declared to be 'void' or 'void from the beginning' is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material."

In *Newland's Estate*, 231 Pa. St. 313, 314, 80 Atl. 255, it is said:

"The nullity of a void marriage may be shown in any legal proceeding where it is a pertinent matter. *Heffner v. Heffner*, 23 Pa. 104; *Thomas vs. Thomas*, 124 Pa. 646, 17 Atl. 182; *Wayne Twp. vs. Porter Twp.*, 138 Pa. 181, 20 Atl. 939; *Clerk's Estate*, 173 Pa. 451, 34 Atl. 68; *Divvers' Estate*, 22 Pa. Supr. Ct. 436."

Fornshill vs. Murray, 1 Bland (Md.) 479; and *Medlock vs. Merritt*, (Ga.) 29 S. E. 185, support the same conclusion.

Clerk vs. Barney, 24 Okla. 455, 103 Pac. 598, is a case in which an attack was made upon the marriage in a proceeding to determine the distribution of the property of the deceased husband, but in that case the exact point was not considered, it apparently being conceded by counsel.

The third proposition involved, as expressed by the defendants, is, that as the land department has found the facts against the plaintiffs, that they will not now be heard to question its decision.

It is, of course, true that the findings of fact in the land department are generally accepted as true by the courts, but in this case no evidence was heard, and there are no findings of fact. The register and receiver of the local land office, a few days after the contest affidavit was filed by the plaintiffs, rejected it on the ground that it was insufficient under the rule of the cases of *Smothers vs. Mitchell* and *McMartin vs. Sportsman*, 22 Land Decisions 263.

We do not have access to the unreported case of *Smothers vs. Mitchell*, but the case of *MacMartin vs. Sportsman* does not sustain the position of the defendants in this case, because there the conclusion was based upon the idea that "The laws of Oklahoma limit the institution of proceedings to annul a marriage, on the ground alleged in this case, to the parties themselves during the lifetime of both, or to the former wife (Statutes of Oklahoma, 1890, sections 3371 and 3372.)" An examination of those

sections discloses that they do not apply to a case where the marriage is incestuous and void because of the relation between the parties, and in addition to this, those sections seem to have been omitted in the revision of 1893 (Chap. 49 of the Statutes of 1893) and the revision of February 26, 1897 (Chap. 51 of Wilson's Rev. & Ann. St.) The decision of the register and receiver was affirmed by the commissioner upon the same ground, and manifestly that was the only proposition involved in the contest and on the appeal to the Secretary of the Interior, and as the contest was in the form prescribed by the land office, what is said in the Secretary's opinion beyond the issue raised manifestly cannot add anything to the record itself.

For the error in sustaining the demurrer to the petition, the case should be reversed and remanded.

Aug. 20, 1912. By the Court: Adopted in whole.

8

2nd Subdivision.

The case-made filed in the Supreme Court in said case No. 1930 contained a copy of the same petition and exhibits thereof made in the same manner and form as hereinafter set up in the case-made in this case, to-wit: No. 5978, as hereinafter set forth.

9

3rd Subdivision.

That after this State Supreme Court had held said petition good upon demurrer, the defendants, Luttie B. Jones, et al., filed a petition for a rehearing and as a part of said petition for rehearing filed and submitted to said State Supreme Court a copy of the transcript upon appeal of the case of Lena Barnes vs. Hollen H. Fearnow from the United States Land Office at Guthrie, Oklahoma, to the Commissioner of the General Land Office of the United States.

10

4th Subdivision.

(Filed Jan. 10, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,
vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and
Emily F. Fearnow, as Next Friend for Toledo Chamberlain,
Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew,
Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and
Richard T. Fearnow, Infants; The Phoenix Mutual Life Insurance
Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Petition in Error.

The said plaintiffs in error complain of the said defendants in error for that the said defendants in error, Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel and Emily F. Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, infants, and R. C. Fearnow at the September term, 1913, of the District Court of Kay county, Oklahoma, and on to-wit: the first day of September, A. D. 1913, in a certain action then pending in said court wherein the said Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, infants were plaintiffs and these plaintiffs in error, Luttie B. Jones and Elmer Jones and the said defendants in error R. C. Fearnow and The Phoenix Mutual Life Insurance Company were defendants recovered a judgment by the consideration of said court against the said plaintiffs in error and the said defendant in error. The Phoenix Mutual Life Insurance Company, adjudging and decreeing that this plaintiff in error, Luttie B. Jones was the patentee in fee simple from the United States of America for the following described real estate situated and being in the county of Kay

11 and State of Oklahoma, to-wit: The Southwest Quarter of Section Eleven in Township Twenty-six North of Range One East of the Indian Meridian; and that she held the same in trust for the said plaintiffs and the said defendant R. C. Fearnow. That the said plaintiffs and the said Defendant R. C. Fearnow were the owners in fee simple of the said real estate as follows to-wit: that the said Emily F. Fearnow, Emma F. Doepel, R. C. Fearnow, Richard T. Fearnow, Toledo Chamberlain and Walter D. Hadley each owned an undivided one-eighth of said described premises, and that the said Neva McGrew, Grace McGrew, Ralph McGrew, Violet McGrew, Ethel Turner, Hilary Turner, Lester Turner and Cecil Turner each own an undivided one-thirty second of said premises; and that these plaintiffs in error said Luttie B. Jones and Elmer Jones, defendants below, had no right, title, interest or estate in or to the said real estate, and that they execute a good and sufficient deed conveying the said real estate to the said owners and further adjudging and decreeing that a certain mortgage executed by the said Luttie B. Jones and Elmer Jones to one P. H. Albright dated August 1st, 1908, mortgaging the said real estate to the said P. H. Albright to secure the payment to him of the sum of Three Thousand Dollars and filed for record in the office of the Register of Deeds of Kay County, Oklahoma, August 1st, 1908, and recorded in Book 34 of Mortgages at page 87 of the records of said office, and which said Mortgage was on to-wit: the 1st day of September, 1908, assigned by the said P. H. Albright to the said Phoenix Mutual Life Insurance Company; did not, and does not constitute any lien or in-

cumbrance upon the said real estate and cancelling, setting aside and holding for naught the said mortgage; and that the said plaintiffs have and recover of and from the said defendants Luttie B. Jones, Elmer Jones and The Phoenix Mutual Life Insurance Company the costs of said suit taxed at \$92.20. A full, true and correct copy of the said judgment and decree together with all the pleadings, evidence, motions, orders, findings, stipulation, papers
12 and proceedings on which the same is based and all the proceedings had in said cause are fully set out in a case-made duly certified, attested and filed and hereto attached and marked "Exhibit A," hereby referred to and made a part of this petition in error.

Plaintiffs in error allege that the defendant in error The Phoenix Mutual Life Insurance Company refuses to join with them in this petition in error and they therefore make it a defendant in error herein.

Plaintiffs in error allege that there are manifest, divers, and sundry errors in the said record and proceedings to the substantial rights, and to the substantial prejudice of said plaintiffs in error in this to-wit:

First. The decision and judgment of the court is contrary to the evidence.

Second. The decision and judgment is contrary to the law.

Third. The decision and judgment is contrary to the law and the evidence.

Fourth. The decision and judgment is not sustained by sufficient evidence.

Fifth. The decision and judgment should have been for these plaintiffs in error, defendants below.

Sixth. The court erred in admitting incompetent, irrelevant and immaterial evidence offered on the part of the plaintiffs below, defendants in error herein.

Seventh. The court erred in excluding competent, relevant, and material evidence offered on the trial of said cause on the part of plaintiffs below, defendants in error herein.

Eighth. The court erred in overruling and denying the motion of these plaintiffs in error, defendants below, for a new trial.

Ninth. Because upon the admitted facts in said cause these plaintiffs in error, defendants below, were entitled to the decision and judgment of the court in their favor.

Tenth. Because under the pleadings and the evidence these
13 plaintiffs in error, defendants below, were entitled to the decision and judgment of the court in their favor, and said court erred in not rendering judgment thereon for these plaintiffs in error.

Eleventh. Because of error of law occurring at the trial and excepted to by these plaintiffs in error, defendants below.

Wherefore, plaintiffs in error pray that this court review the action of the court below and that said decision and judgment so rendered be reversed, set aside, and held for naught; that said cause be remanded to the court below with directions to dismiss the same

at the costs of plaintiffs below; that these plaintiffs in error be restored to all the rights they have lost by the rendition of such judgment and decree and for such other relief as to the court may seem just and equitable.

J. F. KING,

Attorney for Plaintiffs in Error.

13a (Filed Jan. 10, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,

VS.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants; The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Cross-Petition in Error of the Defendant in Error, The Phoenix Mutual Life Insurance Company.

The defendant in error in the above entitled action, The Phoenix Mutual Life Insurance Company, a corporation, complains of the defendants in error for that the said defendants in error, Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, infants, and R. C. Fearnow, at the September term, 1913, of the district court of Kay county, Oklahoma, and on, to-wit: the first day of September, A. D., 1913, in a certain action then pending in said court wherein the said Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, infants, were plaintiffs, and the plaintiffs in error, Luttie B. Jones and Elmer Jones, and the said defendant in error, R. C. Fearnow, and this defendant in error, The Phoenix Mutual Life Insurance Company, were defendants, recovered a judgment by the consideration of said court against the said plaintiffs in error and this defendant in error, The Phoenix Mutual Life Insurance Company, a corporation, adjudging and decreeing that the plaintiff in error, Luttie B. Jones was the patentee in fee simple from the United States of America for the following described real estate, situated and being in the county of Kay and State of Oklahoma, to-wit: The Southwest Quarter of Section Eleven (11) in Township Twenty-six (26) North of Range One (1)

East of the Indian Meridian; and that she held the same in trust for the said plaintiffs and the said defendant R. C. Fearnow. That the said plaintiffs and the said defendant, R. C. Fearnow, were the owners in fee simple of the said real estate, as follows, to-wit: That the said Emily F. Fearnow, Emma F. Doepel, R. C. Fearnow, Richard T. Fearnow, Toledo Chamberlain and Walter D. Hadley each owned an undivided one eighth of said described premises, and that the said Neva McGrew, Grace McGrew, Ralph McGrew, Violet McGrew, Ethel Turner, Hilary Turner, Lester Turner and Cecil Turner each owned an undivided one thirty-second of said premises; and that the plaintiffs in error, said Luttie B. Jones and Elmer Jones, defendants below, had no right, title, interest or estate in or to the said real estate, and that they execute a good and sufficient deed conveying the said real estate, to the said owners and further adjudging and decreeing that a certain mortgage executed by the said Luttie B. Jones and Elmer Jones to one P. H. Albright, dated August 1st, 1908, mortgaging the said real estate to the said P. H. Albright to secure the payment to him of the sum of Three Thousand Dollars, and filed for record in the office of the Register of Deeds of Kay County, Oklahoma, August 1st, 1908, and recorded in Book 34 of Mortgages, at page 87 of the records of said office, and which said mortgage was on to-wit: the 1st day of September, 1908, assigned by the said P. H. Albright to this defendant in error, The Phoenix Mutual Life Insurance Company; did not, and does not constitute any lien or encumbrance upon the said real estate, and cancelling, setting aside and holding for naught the said mortgage; and that the said plaintiffs have and recover of and from the said defendants, Luttie B. Jones, Elmer Jones and this defendant in error, The Phoenix Mutual Life Insurance Company, the costs of said suit, taxed at \$92.20. A full, true and correct copy of the said judgment and decree, together with all the pleadings, evidence, motions, orders, findings, stipulation, papers and proceedings on which the same is based, and all the proceedings had in said

13c cause, are fully set out in a case-made duly certified, attested and filed and hereto attached and marked "Exhibit A," hereby referred to and made a part of this cross-petition in error.

This defendant in error, The Phoenix Mutual Life Insurance Company, a corporation, for its cross-petition in error herein, alleges that there are manifest, divers and sundry errors in the said record and proceedings to the substantial rights and to the substantial prejudice of said cross-petitioner in error, in this to-wit:

First. The decision and judgment of the court is contrary to the evidence, so far as it affects the rights of the Phoenix Mutual Life Insurance Company, a corporation, cross-petitioner in error.

Second. The decision and judgment as to it is contrary to the law.

Third. The decision and judgment as to it is contrary to the law and the evidence.

Fourth. The decision and judgment as to it is not sustained by sufficient evidence.

Fifth. The decision and judgment as to it should have been for

this cross-petitioner in error, one of the defendants in the court below.

Sixth. The court erred in admitting incompetent, irrelevant and immaterial evidence offered on the part of the plaintiffs below, defendants in error herein, prejudicial to the substantial rights of The Phoenix Mutual Life Insurance Company, a corporation, cross-petitioner in error herein.

Seventh. The court erred in excluding competent, relevant and material evidence offered on the trial of said cause on the part of this cross-petitioner in error, one of the defendants in error herein.

Eighth. The court erred in overruling and denying the motion of this cross-petitioner in error, one of the defendants below, for a new trial.

Ninth. Because of the admitted facts in said cause, this 13d defendant in error and cross-petitioner in error, one of the defendants in the court below, was entitled to the decision and judgment of the court in its favor.

Tenth. Because, under the pleadings and the evidence, this defendant in error and cross-petitioner in error, one of the defendants in the court below, was entitled to the decision and judgment of the court in its favor, and said court erred in not rendering judgment therein for this defendant in error, cross-petitioner in error.

Eleventh. Because of errors of law occurring at the trial and excepted to by this defendant in error, one of the defendants in the court below.

Wherefore, this defendant in error and cross-petitioner in error prays that this court review the action of the court below and that said decision and judgment so rendered against it be reversed, set aside and held for naught, and that said cause be remanded to the court below, with directions to dismiss the same at the costs of the plaintiff below, or, to render judgment in favor of this defendant in error and cross-petitioner in error, validating its said mortgage on said real estate, and render judgment in its favor as in its separate answer prayed for in the court below. And that this defendant in error and cross-petitioner in error be restored to all the rights it has lost by reason of the rendition of such judgment and decree, and for such other relief as to the court may seem equitable and just, as in duty bound will it ever pray, etc.

J. F. KING,

*Attorney for Defendant in Error The
Phoenix Mutual Life Insurance Company.*

W. P. HACKNEY,

J. F. LAFFERTY,

*Of Counsel for the Defendant in Error The Phoenix
Mutual Life Insurance Company, Cross-Petitioner
in Error Herein.*

13e In the Supreme Court of the State of Oklahoma.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,

vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain; Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants; The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

I, the undersigned attorney for the defendants in error in the above cause, Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, infants, hereby waive the issuance and service of summons in error in said cause upon them and upon myself as their attorney, and hereby enter the voluntary appearance of said defendants in error therein. Done this 12th day of January, A. D. 1914.

L. A. MARIS,

Att'y for said Def'ts in Error.

I also waive the issuance and service of summons in error on the cross-petition in error in said cause of The Phoenix Mutual Life Insurance Company this 12th day of January, 1914.

L. A. MARIS,

Attorney for Above-named Defendants in Error.

Endorsed: No. 5978. Luttie B. Jones et al. vs. Emily F. Fearnow et al. Waiver of Issuance and Service of Summons in Error. (Filed Jan. 13, 1914. W. H. L. Campbell, Clerk.)

14 UNITED STATES OF AMERICA,

State of Oklahoma, ss:

The State of Oklahoma to the Sheriff of Kay County, Greeting:

You are hereby commanded to notify Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel and Emily Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, defendants in error, that Luttie B. Jones and Elmer Jones, plaintiffs in error, did on the 10th day of January, A. D. 1914, file in the Clerk's Office of the Supreme Court of Oklahoma a petition in error and transcript of record, or case-made, the object of which is to obtain a reversal of a certain judgment rendered by the District Court, sitting within and for the county of Kay and State of Oklahoma, in an action

pending before said Court, wherein the said Emily F. Fearnow, et al., were plaintiffs and the said Luttie B. Jones, et al., were defendants.

You will make return of this Summons in Error on or before the 23rd day of March, 1914.

Witness my hand and the Seal of the Supreme Court affixed hereto, at my office in Oklahoma City, this 12th day of March, A. D. 1914.

[SEAL.]

W. H. L. CAMPBELL, *Clerk*,
By T. H. STURGEON, *Deputy*.

Endorsed on back as follows:

No. 5978. Supreme Court State of Oklahoma. Luttie B. Jones et al. vs. Emily F. Fearnow et al. Summons in Error. Issued 3-12-14. Ret. 3-23-14. J. F. King, Attorney for Plff. in Error. (Filed March 18, 1914. W. H. L. Campbell, Clerk.

STATE OF OKLAHOMA,

Kay County, ss:

Received this writ March 13, 1914 and as commanded therein I summoned the following persons of the defendants in error within named, at the times following to-wit: Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, 15 Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow by delivering to L. A. Maris personally in the said county on March 14, 1914, a true and certified copy of the within summons in error with all the endorsements thereon, he being the attorney of record of said defendants in error in the original case within mentioned of Emily F. Fearnow et al. plaintiffs vs. Luttie B. Jones, et al. defendants, and by delivering a true and certified copy of the within summons in error with all the endorsements thereon on March 14, 1914, to the within named Emily F. Fearnow personally in said county.

Service 1st person50
2 additional50
3 copies75
Mileage 38 miles	3.80

5.55

HUGH JOHNSTON,
Sheriff of Kay County, Oklahoma.
By R. D. DRISKEL, *Deputy*.

UNITED STATES OF AMERICA,

State of Oklahoma, ss:

The State of Oklahoma to the Sheriff of Kay County, Greeting:

You are hereby commanded to notify R. C. Fearnow that Luttie B. Jones and Elmer Jones did on the 10th day of January, A. D.

1914, file in the clerk's office of the Supreme Court of Oklahoma, a petition in error and transcript of record, or case-made, the object of which is to obtain a reversal of a certain judgment rendered by the District court, sitting within and for the county of Kay and State of Oklahoma, in an action pending before said court, wherein the said Emily Fearnow, et al., were plaintiffs, and the said Luttie B. Jones, et al., were defendants.

You will make due return of this Summons in Error on or before the 3rd day of February, 1914.

Witness my hand and the Seal of the Supreme Court affixed hereto, at my office in Oklahoma City, this 24th day of January, A. D. 1914.

[SEAL.]

W. H. L. CAMPBELL, *Clerk.*

By T. H. STURGEON, *Deputy.*

Endorsed on back as follows: No. 5978. Supreme Court
16 State of Oklahoma. Luttie B. Jones et al., vs. Emily F. Fearnow et al. Summons in Error. Issued 1-24-14. Ret. 2-3-14. J. F. King, Attorney for Pl'ff in Error. (Filed Feb. 3, 1914. W. H. L. Campbell, Clerk.)

STATE OF OKLAHOMA,

Kay County, ss:

Received this writ February 2nd, 1914, and as commanded therein, I summoned the within named defendant in error, R. C. Fearnow on February 2nd, 1914, by delivering to him personally on February 2nd, 1914 in Kay County, Oklahoma, a true and certified copy of the within summons in error, with all the endorsements thereon.

Service50
Copy25
Fee Mileage 30 miles	3.00

3.75

HUGH JOHNSTON,

Sheriff of Kay County.

By R. C. DRISKEL,

Deputy.

In the Supreme Court of the State of Oklahoma.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,

vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants; The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

We the undersigned attorneys for the defendant in error in the above cause, The Phoenix Mutual Life Insurance Company, a cor-

poration, hereby waive the issuance and service of summons in error in said cause upon it and upon ourselves as its attorney, and hereby enter the voluntary appearance of said defendant in error therein. Done this 10th day of January, 1914.

J. F. KING,
WM. P. HACKNEY,
JAS. T. LAFFERTY,
Attorneys for said Ins. Co.

Endorsed on back: No. 5978. Luttie B. Jones et al., Pltfs. in Error vs. Emily F. Fearnow, et al. Waiver of Summons in Error by Phoenix Mutual Life Ins. Co. (Filed Jan. 13, 1914. W. H. L. Campbell, Clerk.)

17

5th Subdivision.

Assignments of Error by Luttie B. Jones and Elmer Jones.

1st. Under the pleadings and the evidence, including the agreed statement of facts, these plaintiffs in error, defendants below, were entitled to the decision and judgment of the court in their favor; and the court erred in rendering its decision and judgment in favor of the plaintiffs, and the defendant, R. C. Fearnow, and erred in not rendering its decision and judgment for these plaintiffs in error, defendants below.

2nd. The decision and judgment of the court is contrary to the evidence.

3rd. The decision and judgment is contrary to the law.

4th. The decision and judgment is contrary to the law and the evidence.

5th. The decision and judgment is not sustained by sufficient evidence.

6th. Under the admitted facts in said cause, these plaintiffs in error were entitled to the decision and judgment of the court in their favor; and the court erred in rendering judgment for plaintiffs, and defendant R. C. Fearnow, and in not rendering judgment for these plaintiffs in error defendants below.

7th. The court erred in not rendering its decision and judgment for these plaintiffs in error, defendants below.

8th. The court erred in overruling and denying the motion of these plaintiffs in error, defendants below, for a new trial.

9th. Error of law occurring at the trial and excepted to by these plaintiffs in error, defendants below.

18

6th Subdivision.

Objections and Counter Assignment of Errors by Emma F. Doepel et al.

First. There is no averment by way of recital in the case-made that it contains all of the evidence offered or introduced upon the

trial of said cause, and such being the case, the court cannot examine the evidence and consider any questions that would be determined upon such examination.

Second. The district court of Kay county, in an action of this kind, is limited to a consideration of the issues and the evidence that were before the Secretary of the Interior, and the question of disqualification of the homestead entryman, Hollen H. Fearnow not having been raised by any one in the contest of these plaintiffs against the defendant, Luttie B. Jones, the district court of Kay county had no jurisdiction to consider that question in this resulting trust case. Therefore, as to that proposition the judgment of the lower court should be affirmed.

Third. At the time of the execution of the mortgage now owned by the cross-petitioner, The Phoenix Mutual Life Insurance Company, patent had not issued, and legal title to the land had not passed to the defendant, Luttie B. Jones. For this reason, P. H. Albright and The Phoenix Mutual Life Insurance Company were not and could not be innocent purchasers and had no rights under this mortgage and the assignment thereof as such. There can be no innocent purchaser of real estate from a party who does not possess the legal title thereto.

19

7th Subdivision.

Assignments of Error by Cross-petitioner The Phoenix Mutual Life Ins. Co.

1. The decision and judgment of the court below as against this defendant in error is contrary to the evidence.

2. That said decision is contrary to the law.

3. That said decision is contrary to the law and the evidence.

4. That the said judgment is not sustained by sufficient evidence.

5. That said decision and judgment should have been for this defendant in error.

6. That as to this defendant in error, all of the plaintiff's testimony and all of the facts admitted in the court below, of every kind and character, prejudicial to the rights of this defendant in error, were erroneous.

7. The court erred in overruling this defendant in error's motion for a new trial.

8. The judgment and decree of the court below should have been for this defendant in error and against the plaintiffs in the court below, the other defendants in error herein.

9. Under the pleadings and the evidence, the decision and judgment of the court below should have been for this defendant in error.

20

8th Subdivision.

EXHIBIT A.

Case-Made.

(Filed in the District Court Jan. 3, 1914. Fred C. Groshoug, Clerk of the District Court.)

(Filed Jan. 10, 1914. W. H. L. Campbell, Clerk.)

Be it remembered, that on the 20th day of April, 1909, Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel and Emily F. Fearnow as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, as plaintiffs, filed their petition in the office of the clerk of the District Court of Kay county, State of Oklahoma, and with said clerk, against Luttie B. Jones, Elmer Jones, R. C. Fearnow and The Phoenix Mutual Life Insurance Company, a corporation, as defendants, which petition with the endorsements thereon is in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Heva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Petition.

The plaintiffs complain of the defendants and as cause of action allege and state:

That the plaintiffs above named, together with the defendant, R. C. Fearnow, are the sole and only heirs of one Hollen H. Fearnow, deceased;

That the defendant, R. C. Fearnow, is a proper party plaintiff in this cause but that he refuses to join with these plaintiffs and therefore they have made him a defendant as the law requires;

That on March 29th, 1899 the said Hollen H. Fearnow was a male citizen of the United States of America, more than twenty-one years of age; that he was the owner of no land nor had he at any time previous to said date been the owner of any land, nor had he at any time previous to said date made homestead entry upon any of the

public lands of the United States, and was in no way disqualified from making homestead entry under the land laws of the United States; that on said date of March 29th, 1899, said Hollen H. Fearnow made homestead entry in the United States Land Office at Guthrie, Oklahoma, upon the real estate described as follows, to-wit: Southwest quarter of Section Eleven (11) Township Twenty-six (26) North, Range One (1) East of the Indian Meridian in Kay County, Oklahoma; that he immediately went into the possession of the said premises and resided thereon and cultivated and made improvements upon the same from and after said date for a period of more than five years, until the date of the death of the said Hollen H. Fearnow, to-wit: the — day of October 1905; that on the 16th day of May, 1903 one Lena Barnes filed her affidavit of contest against the said entry of the said Hollen H. Fearnow and that proceedings were pending under said contest at the time of the death of the said Hollen H. Fearnow; that said proceedings were never revived against the heirs of the said Hollen H. Fearnow but were by the said Lena Barnes dismissed on November 26th, 1906; that on the 28th day of November, 1906, one Luttie B. Jones, then Luttie B. Fearnow, falsely claiming to be the widow of the said Hollen H. Fearnow, deceased, filed in the United States Land Office at Guthrie, Oklahoma, a purported relinquishment of the said Homestead Entry of the said Hollen H. Fearnow, made March 29th, 1899, covering the above described premises, that said relinquishment was null, void and of no effect as against the heirs of the said Hollen H. Fearnow, deceased and that at the same time and place the said Luttie B. Jones, then Fearnow, filed her homestead Entry upon the said described land.

22 Plaintiffs further state that at the time of the filing of the said relinquishment and the said Homestead Entry by the said Luttie B. Jones, then Luttie B. Fearnow, that she claimed to be the wife of the said Hollen H. Fearnow, deceased; but these plaintiffs further state and allege the facts to be that on August 26th, 1901, at Wichita, State of Kansas, the said Hollen H. Fearnow, deceased, and the said Luttie B. Fearnow went through a pretended marriage ceremony; that at the time of the said pretended marriage the said parties were residents of the Territory of Oklahoma; that the said Hollen H. Fearnow and the said Luttie B. Jones, then Fearnow, were first cousins by blood, the fathers of the said parties being brothers; that both the laws of the Territory of Oklahoma and of the State of Kansas at the time of the said marriage and at this time prohibit the marriage of First Cousins by blood and declare said marriages to be incestuous and absolutely void. That the law of Kansas, then in force and now in force, is as follows, to-wit:

“All marriages between parents and children, including grand parents and grand children of any degree, between brothers and sisters of the one half blood as well as the whole blood, and between uncles and nieces, aunts and nephews, and first cousins, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.” Act of May 27, 1867, Section 2.”

Plaintiffs further allege that on the 12th day of December, 1906, the plaintiffs, Emily F. Fearnow and Emma F. Doepel filed for themselves and for the other plaintiffs herein and for the defendant, R. C. Fearnow their contest affidavit before the United States Land Office at Guthrie, Oklahoma, against the said Homestead Entry of the said Luttie B. Jones, then Fearnow, setting up in said affidavit that they were the sole and only heirs of the said Hollen H. Fearnow, deceased; that the said pretended relinquishment of the said Luttie B. Jones was void for the reason that she was not his wife, asking that the said entry of the said Luttie B. Fearnow be cancelled, that the said pretended relinquishment of the said Hollen H. Fearnow's Homestead Entry be set aside and that the said Entry be reinstated and that they as his sole heirs be allowed to make final proof thereunder and to receive patent from the United States for the said described land; in said contest affidavit they offered to prove all the above mentioned facts in relation to the said marriage and in relation to the laws of Kansas relating thereto, a copy of which said contest affidavit is hereto attached, marked "Exhibit A" and made a part hereof;

That on the 5th day of January, 1907, the United States Land Office at Guthrie, Oklahoma, rejected the said contest, holding that the question of the invalidity of the marriage of the contestee with the said Hollen H. Fearnow, deceased, was one that the United States Land Office should not consider; a copy of which said decision is hereto attached, marked "Exhibit X" and made a part hereof.

That the said matter was duly appealed to the Commissioner of the General Land Office of the United States and there the decision of the United States Land Office at Guthrie, Oklahoma, was by the said Commissioner on the 13th day of May, 1907, affirmed, a copy of said decision of the said Commissioner is hereto attached, marked "Exhibit B" and made a part hereof;

That the contestants duly appealed from the decision of the said Commissioner of the General Land Office to the Secretary of the Interior of the United States; that on the 16th day of September, 1907, the Secretary of the Interior handed down an opinion affirming the decision of the Commissioner of the General Land Office of the United States, above mentioned and referred to; a copy of which decision of the said Secretary of the Interior is hereto attached, marked "Exhibit C" and made a part hereof.

Plaintiffs further state that said Luttie B. Jones afterward made final proof upon said land and that on the 15th day of March, 1909, patent was issued to her by the United States of America for the said described premises and was soon afterwards delivered to her and that she now holds the legal title to the said premises.

That the Department of the Interior committed error in said decisions and in all of them in refusing to permit these plaintiffs to show that the said Luttie B. Jones, then Fearnow, the defendant herein, was not the wife of the said Hollen H. Fearnow, deceased; that by said department these plaintiffs were wrongfully denied the right show that they were the sole and only heirs of the said Hollen H. Fearnow, deceased, and were therefore

entitled to make Final Proof under the land laws of the United States and to receive the patent to the said described premises; that the plaintiffs are in equity the rightful owners of the said above described tract of land and entitled to have the legal title to said land vested in them by a decree of this court, by reason of the facts as above mentioned and set forth; that the claims of these plaintiffs to said tract of land should have been held prior and superior to those of the defendant, Luttie B. Jones, and that patent conveying title to said tract of land should have been issued to these plaintiffs instead of to the said defendant, Luttie B. Jones.

That the plaintiffs have no adequate remedy at law in the premises.

That the defendants, Elmer Jones and the Phoenix Mutual Life Insurance Company each have or claim to have some interest in and to the above described premises, but that if any interest they have therein that the same is junior and inferior to that of these plaintiffs.

Plaintiffs further state that they are informed and believe and therefore allege the fact to be that the defendant, Luttie B. Jones, expended certain sums in the Department of the Interior in the procuring of said patent and for other purposes therein, the exact amount of which is unknown to plaintiffs; and they are unable to plead the same; plaintiffs offer to repay said sums to said defendant and hereby tender the same into court for her use and benefit.

Wherefore, the plaintiffs pray for judgment that their interest in and to the said described tract of land be declared prior and superior to those of the defendants, Elmer Jones and The Phoenix Mutual Life Insurance Company; that these plaintiffs be declared the owners of the said described premises; that the court decree that the defendant, Luttie B. Jones, holds the legal title to said land in trust for the plaintiffs herein; that the said Luttie B. Jones be required by decree of court to convey said legal title to plaintiffs, and in default of the said defendant so to convey, that the court appoint a commissioner to execute such conveyance, and for such other and further relief as shall be agreeable to equity and for the costs of this suit.

L. A. MARIS,
Attorney for Plaintiffs.

"EXHIBIT A."

Department of the Interior,

United States Land Office at Guthrie, Oklahoma.

EMILY F. FEARNOW and EMILY F. DOEPEL, for Themselves and on
Behalf of the Other Heirs of Hollen H. Fearnow, Deceased, Con-
testants,

VS.

LUTTIE B. FEARNOW, Contestee.

Involving Homestead Entry No. 14423, Covering the S. W. $\frac{1}{4}$ of
Sec. 11, Tp. 26 N., R. 1 E., I. M.

Contest Affidavit.

TERRITORY OF OKLAHOMA,

County of Kay, ss:

Personally appeared before me, George B. Waltz, a Notary public in and for the county of Kay, Territory of Oklahoma, Emily F. Fearnow and Emma F. Doepel, of Ponca City, Oklahoma Territory, who upon their oaths say:

That they are each well acquainted with the tract of land embraced in the Homestead Entry of Luttie B. Fearnow, No. 14423 made November 28th, 1906 for the Southwest Quarter of Section Eleven (11) Township Twenty-six (26) North, Range One (1) East I. M., located in Kay County, Oklahoma, and know the present condition of the same; and as ground of contest against said entry, state and allege:

That heretofore, to-wit, on March 29, 1899, one Hollen H. Fearnow filed his Homestead Entry No. 10171 on said above described land; that on May 16, 1903, one Lena Barnes filed contest No. 3665 against the Homestead Entry of the said Hollen H. Fearnow No. 10171; that pending the final disposition of the said contest of the said Lena Barnes, to-wit, on October 23, 1905, the said Hollen H. Fearnow departed this life leaving surviving him as his heirs the following persons, to-wit:

His mother, Emily F. Fearnow, one of the affiants; his ssister, Emma F. Doepel, the other affiant, both over twenty-one years of age. Also the following minor heirs who are still living and are still minors:

Toledo Chamberlain, age three, daughter of Nora A. Chamberlain, deceased, who was a sister of Hollen H. Fearnow, deceased; Ethel, age seventeen, Hillery Turner, age sixteen, Lester Turner, age fourteen, Cecil Turner, age thirteen, all children of Alferetta S. Turner, deceased, who was a sister of Hollen H. Fearnow, deceased; Walter Hadley, age ten, son of Ignolia Hadley, deceased, who was also a sister of Hollen H. Fearnow, deceased; Nèva McGrew, age eleven, Ralph McGrew age ten, Violet McGrew, age eight, Grace McGrew, age seven, all children of Anna M. McGrew, deceased, who was a sister of Hollen H. Fearnow, deceased. That there are no other legal heirs of the said Hollen H. Fearnow, deceased.

That the said Hollen H. Fearnow was a single man at the time of his death and a resident of the Territory of Oklahoma; that under and by virtue of the laws of the Territory of Oklahoma, his mother, living sister and brothers, and the children of his deceased sisters taking the share of their deceased mothers, inherit an equal share of his estate, to-wit, a one-eighth share.

That before the death of the said Hollen H. Fearnow his said Homestead Entry No. 10171 was cancelled by virtue of the contest of the said Lena Barnes; that the said Lena Barnes made Homestead Entry on said above described tract of land, the same being Homestead Entry No. 13690 and made September 6, 1904; that afterwards

and before the death of the said Hollen H. Fearnow by letter "H" of January 20, 1905, from the Commissioner of the General Land Office, the said Homestead Entry of the said Lena Barnes was suspended and all the proceedings in the said contest set aside because of no legal service of notice of said contest on the said Hollen H. Fearnow, contestee therein, and a new hearing was ordered in said case; that before the final trial and upon this new hearing of the said contest said Hollen H. Fearnow died.

Said contest of the said Lena Barnes was never at any time revived against the heirs of the said Hollen H. Fearnow, deceased and said heirs were not made parties thereto.

That on November 28, 1906, the said Lena Barnes dismissed said contest and relinquished all claim and title to the said Southwest Quarter of Section eleven (11) Township twenty-six (26) North, Range One (1) East I. M., the land covered by her said Homestead Entry No. 13690. That as against these affiants and the other heirs of the said Hollen H. Fearnow, deceased, the said Lena Barnes had no right, title or claim to the said above described land because she failed and neglected to revive said contest against said heirs and had in fact no right or claim to relinquish.

That on November 28, 1906, the contestee herein, Luttie B. Fearnow, claiming to be the widow of the said Hollen H. Fearnow, deceased, without the knowledge or consent of these affiants or the other heirs of the said Hollen H. Fearnow, filed in the United States Land Office at Guthrie, Oklahoma, a purported relinquishment of the said Homestead Entry of the said Hollen H. Fearnow, made March 29, 1899, No. 10171, covering the Southwest Quarter of Section eleven (11) Township Twenty-six (26) North, Range One (1) East of the I. M. that said relinquishment is null, void and of no effect as against the heirs of the said Hollen H. Fearnow, deceased. That at the same time and place the said Luttie B. Fearnow filed her Homestead Entry No. 14423 on the land above described; that the said Homestead Entry is null and void because of the rights of the heirs of the said Hollen H. Fearnow; that said rights could not be relinquished by the said Luttie B. Fearnow, and her attempted entry made in her own right should be cancelled.

Affiants further say that the contestee, Luttie B. Fearnow, claims to be the widow of Hollen H. Fearnow, deceased, but affiants allege the facts to be that on August 26, 1901, at Wichita, State of Kansas, the said Hollen H. Fearnow, deceased, and Luttie B. Fearnow, contestee, went through a pretended marriage ceremony; that at the time of said pretended marriage said parties were residents of the Territory of Oklahoma; that the said Hollen H. Fearnow and the contestee, Luttie B. Fearnow, were first cousins by blood, the fathers of the said parties being brothers; that both the laws of the Territory of Oklahoma, and of the State of Kansas, at the time of said marriage, and at this time prohibit the marriage of first cousins by blood and declare said marriages to be incestuous and absolutely void. The law of Kansas then and now in force being as follows, to-wit:

"All marriages between parents and children, including grand-

parents and grandchildren of any degree, between brothers and sisters of the one half blood as well as the whole blood, between uncles and nieces, aunts and nephews, and first cousins, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations." Act May 27, 1867, Section 2.

The law of Oklahoma then and now in force was and is as follows, to-wit:

"Marriages between parents and children, ancestors and descendants of any degree, of a stepfather with a stepdaughter, a step-mother with a step-son, between uncles and nieces, aunts and nephews, between brothers and sisters of the half as well as the whole blood, father in law and daughter in law, mother in law and son in law, and first cousins are declared to be incestuous, illegal and void and are expressly prohibited."

Affiants further allege that the contestee, Luttie B. Fearnow, pretending and claiming to be the widow of Hollen H. Fearnow, deceased, is now and has been continuously since the death of Hollen H. Fearnow, on October 23, 1905, forcibly holding possession of the above described land against the rights and claims of the lawful heirs of the said Hollen H. Fearnow, deceased.

Affiants make this affidavit and bring this contest on behalf of themselves and all the other heirs of the said Hollen H. Fearnow, deceased.

And all the allegations herein made, affiants are ready to prove at such time as may be named by the register and receiver for a hearing in said case and we therefore ask to be allowed to prove said allegations and that said Homestead Entry No. 14423 may be declared cancelled and forfeited to the United States, they the said contestants, paying the expense of such hearing.

EMILY F. FEARNOW.
EMMA F. DOEPEL.

Subscribed and sworn to before me this 5 day of December, 1906.
[SEAL.]

GEO. B. WALTZ,
Notary Public.

My commission expires Nov. 20, 1909.

Paul Doepel also appeared at Ponca City, O. T., who being duly sworn deposes and says:

That he is acquainted with the tract of land above described in the affidavit of Emily F. Fearnow and Emma F. Doepel, and knows that the statements made therein are true.

PAUL DOEPEL.

Subscribed and sworn to before me this 10 day of December, 1906.
[SEAL.]

C. H. HOLLOWAY,
Notary Public.

My commission expires Nov. 29, 1908.

"EXHIBIT B."

"H"
J. L. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 13, 1907.

Doc. —. Case 2346.

EMILY F. FEARNOW and EMMA F. DOEPEL, for Themselves and
Other Heirs of Hollen H. Fearnow,

VS.

LUTTIE B. FEARNOW, NOW JONES.

Contest Dismissed. Affirmed.

Register and Receiver, Guthrie Oklahoma.

SIRS: November 28, 1906, Luttie B. Fearnow, made H. E. No. 14423 for S. W. $\frac{1}{4}$ Sec. 11, T. 26, R. 1.

28 Dec. 12, 1906, Emily F. Fearnow and Emma F. Doepel, for themselves and other heirs of Hollen H. Fearnow, filed a contest against said entry alleging, in substance, that on March 29, 1899, one Hollen H. Fearnow made H. E. No. 10171, for the S. W. $\frac{1}{4}$ Sec. 11, T. 26, R. 1 against which one Lena Barnes filed her contest and pending which contest the entryman on October 23, 1905, died leaving surviving him as heirs, Emily F. Fearnow, his mother, Emma F. Doepel, his sister, Royal C. and Richard T., Fearnow, brothers of the deceased entryman, and the minor children of three deceased sisters of the entryman, names given; that said entryman was a single man at the time of his death; that before the death of the said Hollen H. Fearnow his entry was cancelled by reason of the contest of Lena Barnes and that said Barnes on September 6, 1904, made H. E. No. 13690 for the land; that after the death of Fearnow the contest of Barnes was by decision "H" of January 20, 1905, set aside because of defective service of notice and a new hearing was ordered; that the contest was never revived against the heirs; that on November 28, 1906, Barnes dismissed the contest, relinquished her entry and on the same day Luttie B. Fearnow, claiming to be the widow of Hollen H. Fearnow, filed her relinquishment of H. E. No. 10171, made by Hollen H. Fearnow March 29, 1899, and was allowed to make H. E. No. 14423 for the land in her own name; that said entry is null and void because of the rights of the heirs of Hollen H. Fearnow; that the rights of the said heirs could not be relinquished by said Luttie B. Fearnow, now Jones; that on August 26, 1901, at Wichita, Kansas, said Hollen H. Fearnow, deceased, and Luttie B. Fearnow, now Luttie B. Jones, went through a pretended marriage ceremony; that at the time of the said pretended marriage said parties were living in the Territory of Oklahoma; that said parties were first cousins by blood, the fathers of the said parties being brothers; and both the laws of Kansas and of Oklahoma at the time of the said

marriage prohibited the marriage of first cousins by blood and declared such marriage to be absolutely void; (here is inserted the marriages (statutes) of the states in regard to marriages of first cousins) that the said Luttie B. Jones, formerly Fearnow, pretending and claiming to be the widow of the deceased Fearnow is now and has been continuously holding possession of the land against the rights and claims of the lawful heirs, all of which matters the heirs are ready to furnish proof of and ask that a hearing be ordered.

January 5, 1907, you rejected the contest citing as authority therefor the case of *McMartin vs. Sportsman* (22 L. D. 263), and the unreported decision of the department dated July 19, 1901 in the case of *George Smothers vs. Lizzie Mitchell*.

In the case of *Smothers vs. Mitchell*, the allegation was that Mrs. Mitchell at the time of her marriage to Luke Mitchell was the wife of one Waldruf, and in that case as in this, the contest was brought by parties claiming to be the heirs of the deceased entryman.

In dismissing the contest in said case, the ruling in the case of *MacMartin vs. Sportsman*,

"That no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department could not question the validity of the marriage on the protest filed," was cited.

As the homestead herein devolved upon the widow under the federal statute, Mrs. Fearnow had the right to relinquish the same and make the entry in her own name, and your action rejecting the contest on the charge that her marriage to the deceased entryman was not valid, was correct and is hereby affirmed with right of appeal.

So advise the parties and in due time report action taken.

Respectfully,

R. A. BALLINGER, *Commissioner*.

T. W. AKIN.

"EXHIBIT C."

H. S. B.
D. 921.

DEPARTMENT OF THE INTERIOR, E. F. B.
WASHINGTON, Sept. 1, 1907.

29

EMMA F. DOEPEL et al.

vs.

LUTTIE B. JONES, NOW FEARNOW.

Appeal.

The Commissioner of the General Land Office.

SIR: This appeal is filed by Emma F. Doepel and others as heirs of Hollen H. Fearnow, from the decision of your office of May 13, 1907, dismissing their contest against the Homestead Entry of Luttie B. Jones, for the S. W. $\frac{1}{4}$ Sec. 11, T. 26 N., R. 1 E., Guthrie, Oklahoma.

The contestants are the mother, the sister and the brothers of Hol-

len H. Fearnow who made entry of the land March 29, 1899, but whose entry was cancelled upon the contest of Lena Barnes, the contestant Barnes on September 6, 1904, made entry of the land. Fearnow died October 23rd, 1905, and after his death the decision cancelling his entry was vacated January 20, 1905, and a new hearing was ordered upon the contest of Barnes against the Fearnow Entry. November 28, 1906, Barnes dismissed her contest relinquished her entry and on the same day Luttie B. Fearnow, as widow, filed a relinquishment of Hollen H. Fearnow's entry and was allowed to make entry of the land in her own right.

The contestants allege that the entry of Luttie B. Fearnow is null and void for the reason that her pretended marriage with Hollen H. Fearnow was invalid; this is a question the department cannot determine from the record before it. But independent of this contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right it would be necessary to reinstate that entry and to show that it was improperly cancelled not by reason of any technical objection in the procedure, but upon its merits. Furthermore their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry.

Your decision is affirmed, and the papers are returned herewith.

Very respectfully,
(Signed)

JESSE E. WILSON,
Acting Secretary.

"EXHIBIT X."

Jan. 5, 1907.

Rejected for the reason that the allegations of the affidavit of contestee are insufficient under rule in case of George W. Smothers vs. Lizzie Mitchell, widow of Luke Mitchell, deceased (unreported). Inv. N. E. ¼ Sec. 27, Tp. 28, Range 1 East. Hon. Secretary's decision of July 19, 1901. And also rule in case McMartin vs. Sportsmans, 22 L. D. 263. Thirty days allowed to appeal.

L. H. HOUSTON, *Register.*
WILLIAM B. HODGE, JR., *Receiver.*

Said petition is endorsed as follows: "3900 Fearnow et al. vs. Jones et al. Petition. Filed April 20, 1909. Ed. P. Reed, Clerk, by O. H. Attebery, Deputy. L. A. Maris, Attorney for Plaintiffs."

Be it further remembered that thereafter, on December 11th, 1912, leave of said court being first duly had, the said defendants, Luttie B. Jones and Elmer Jones, filed in the office
30 of the clerk of said court, and with said clerk, their answer

to said petition, which answer in words and figures is as follows, to-wit:

In the District Court of Kay County, Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX Mutual Life Insurance Company, a Corporation, Defendants.

Comes now the said defendants Luttie B. Jones and Elmer Jones and for their answer to the petition of the plaintiffs in said cause, deny each and every allegation in said petition contained, save and except as herein specifically admitted.

These defendants admit that the defendant, R. C. Fearnow refused and refuses to join with the plaintiffs in their petition herein, and that they made him a defendant in said petition.

Defendants admit that on the 29th day of March 1899, Hollen H. Fearnow was a male citizen of the United States and more than 21 years of age. That on said date he made homestead entry in the United States Land Office at Guthrie, Oklahoma upon the Southwest Quarter of Section Eleven, Township twenty-six North of Range One East of the Indian Meridian, in Kay county, Oklahoma, and went into possession of said premises, and that he died on the — day of October, A. D., 1905.

Defendants admit that on the 16th day of May, 1903, one Lena Barnes filed her contest affidavit against the said entry, and that on the 28th day of November, 1906 this defendant Luttie B. Jones, then Luttie B. Fearnow filed her homestead entry upon said land.

These defendants admit that thereafter the said Luttie B. Jones, then Luttie B. Fearnow, made final proof upon said land and that thereafter on the 15th day of March, 1909, the United States of America issued to her a patent for said land, and the same was soon after delivered to her.

31 Defendants admit that the defendant Luttie B. Jones and Hollen H. Fearnow were married to each other on August 26, 1901, at Wichita, Kansas, and that they were residents of Oklahoma. And admit that on the 28th day of November, 1906, she filed in the United States Land Office at Guthrie, Oklahoma, a relinquishment of the said Homestead Entry of Hollen H. Fearnow covering the above described premises.

These defendants further answering state that the land involved in this case, to-wit: The Southwest Quarter of Section eleven, in Township twenty-six North of Range One East of the Indian Meridian, in Kay county, Oklahoma, was on the 29th day of March, A. D., 1899 vacant public land, belonging to the United States and subject to entry and being acquired under the Homestead Laws of the

United States. That about three or four days previous to the said 29th day of March, A. D., 1899, the plaintiff Emily F. Fearnow and the said Hollen H. Fearnow made and entered into a verbal contract whereby it was mutually agreed and understood by and between them, that the said Emily F. Fearnow would give to the said Hollen H. Fearnow a team of horses and a harness in consideration of which the said Hollen H. Fearnow was to and would file on the said land and would immediately settle upon and farm the said land and pay to said Emily F. Fearnow one-half of what crops he raised on said land in the year 1899 and one-third of the crops he raised on said land each and every year thereafter, and would prove said land up and obtain a patent from the United States for the same, in his own name as patentee and then deed the said land to the said Emily F. Fearnow. That in three or four days after said contract and agreement was made and entered into and in pursuance of and in accordance and compliance with his said contract the said Hollen H. Fearnow on to-wit, the 29th day of March, A. D., 1899, did file upon and make Homestead Entry of the said land in the United States Land Office at Guthrie, Oklahoma, and he immediately delivered to said Emily F. Fearnow his filing papers for the same, the receivers duplicate receipt, and did immediately settle upon the said land and continue to occupy and improve the said land and

32 farm the same until the — day of October, A. D., 1905, on which date he died without having made final proof therefor, or having proved up the said land.

That the said Emily F. Fearnow did procure the said Hollen H. Fearnow to settle upon the said land with the intent thereafter of acquiring title thereto in herself, and said entry was not made for the use or benefit of said Hollen H. Fearnow but illegally and for the use and benefit of said Emily F. Fearnow.

That the said Hollen H. Fearnow paid the rent of said land to the said Emily F. Fearnow.

That this defendant Luttie B. Jones and the said Hollen H. Fearnow were duly and legally married to each other on the 26th day of August, 1901, and she immediately went to live with the said Hollen H. Fearnow on the said land and resided thereon as her home continuously and improved the same from said date until the — day of —, 1910.

That on to-wit: May 16, 1903, one Lena Barnes filed her affidavit of contest against the said entry of Hollen H. Fearnow in the United States Land Office at Guthrie, Oklahoma, charging that the said land was filed on by the said Hollen H. Fearnow for the purposes of speculation and was held for speculative purposes and not for the purpose of making it his home, and that he was holding it fraudulently, illegally and for the use and benefit of another person, to-wit: Emily F. Fearnow, and that for a valuable consideration he had agreed and contracted with the said Emily F. Fearnow to prove up on said land and obtain a patent therefor, and then transfer the same to said Emily F. Fearnow, who is one of the plaintiffs in this case.

That a trial of the said contest was had before the register and Receiver of the said Office on the 10th day of August, 1903, and on the 15th day of December, 1903, the said Register and Receiver rendered their decision thereon, holding and adjudging that the charges in the said contest affidavit were true. That said entry was not made for the use or benefit of said Hollen H. Fearnow, but was made for the use and benefit of said Emily F. Fearnow for the consideration and in pursuance of the contract above set out, and that the entry was "void from its inception and that no acts of the entryman after entry could make it valid," and cancelled said entry.

That thereupon the said Lena Barnes was by the order of the said Register and Receiver permitted to and did file on said land, and did make her homestead entry of said land under the Homestead Laws of the United States in said office for said land. That thereafter on the — day of October, 1905, the said Hollen H. Fearnow died without having proved up said land, or having obtained patent for the same, leaving no child, nor the descendant of any child of his surviving him, and leaving this defendant Luttie B. Jones, then Luttie B. Fearnow, his widow and only heir surviving him.

That thereafter on to-wit November 26, 1906, the said Lena Barnes in said Land Office dismissed and relinquished her said filing and Entry on said land, and dismissed and relinquished her said contest and claim to said land, and thereafter on to-wit, the 28th day of November, 1906, the said land being land subject to Homestead Entry under the Homestead Laws of the United States, this defendant Luttie B. Jones then Luttie B. Fearnow, filed on and made Homestead Entry upon and of, said land in the United States Land Office at Guthrie, Oklahoma, the same being in the said Guthrie, Oklahoma Land District. That at the time of making her said Entry she was a single woman, a native and citizen of the United States of America, over the age of 21 years, and was the owner of no land, nor had she at any time previous to said date been the owner of any land, nor had she at any time previous to her said entry made homestead entry upon any of the lands in the United States, and was at the time of her said entry a qualified entryman and homesteader, under the Homestead Laws of the United States. That she continuously resided upon said land from the 26th day of August, A. D., 1901, to the — day of —, 1910.

That on the — day of July, 1908, she proved up on and made final proof upon the said land in the said Land Office.

That she made improvements on, and cultivated the land according to the laws of the United States and at the time of her said final proof had on said land the following large and substantial improvements, to-wit: a four room frame house, barn for four horses with shed, well, a large orchard, good three and four wire fence all around the place, about 100 acres broke, windmill, large hen house, buggy shed, etc. and received her final receipt from said Land Office, for said land, after paying the necessary fees and expenses and government charges, a copy of said final receipt is hereto attached marked "Exhibit B," and having complied in all matters

and things with the laws of the United States, and the rules and regulations of its Land Department, the United States of America, by the President of the United States, did on the 15th day of March, 1909 make, issue and execute a patent to her as patentee for said land in her own right and not as the widow of Hollen H. Fearnow, conveying said land to her in fee simple, free and clear of any and all restrictions, conditions and limitations, and said patent was filed for record in the Register of Deeds office of Kay county Oklahoma, on April 6th, 1909, a full, true and correct copy of said patent is hereto attached, marked "Exhibit A" and made a part hereof as fully and completely as though copied herein in full.

Wherefore these defendants having fully answered, pray that the plaintiffs take nothing by their suit; that they go hence without day and for costs.

J. F. KING,

Attorney for Defendants, Luttie B. Jones and Elmer Jones.

"EXHIBIT A."

The United States of America to all to whom these presents shall come, Greeting:

Guthrie, 0240. Certificate No. —.

Whereas, Luttie B. Jones, formerly Luttie B. Fearnow, has deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Guthrie, Oklahoma, 35 whereby it appears that full payment has been made by the said Luttie B. Jones, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands" and the acts supplemental thereto, for the Southwest Quarter of Section Eleven, in Township Twenty-six North of Range One East of the Indian Meridian, Oklahoma, containing one hundred sixty acres, according to the official plat of the Survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Luttie B. Jones.

Now, Know ye, That the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, Have Given, and Granted and by these presents Do Give and Grant, unto the said Luttie B. Jones and to her heirs, the said Tract above described; To Have and To Hold the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Luttie B. Jones, and to her heirs and assigns forever.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the fifteenth

day of March in the year of our Lord, One Thousand Nine Hundred and Nine and of the Independence of the United States the one hundred and thirty-third.

(G. L. O.)

By the President, WM. H. TAFT.

[SEAL.]

By M. W. YOUNG,

Secretary.

N. W. SANFORD,

Recorder of the General Land Office.

Patent number.

Recorded 51955 Vol. —, page —.

(Book 30 of Deeds, page 176. Filed April 6, 1909, at 1:00 P. M.)

"EXHIBIT B."

No. 123148.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
GUTHRIE, OKLAHOMA, July 22, 1908.

Receipt.

U. S. Land Office:

Received of Luttie B. Jones, Ponca City, Oklahoma, the sum
36 of Four Hundred Thirty-five Dollars and eighty five
cents.

Purchase price of land, fees and commissions and interest in connection with committed Homestead Entry Serial No. 0240 for Homestead Entry No. 14423.

S. W. $\frac{1}{4}$ Section 11, Township 26 North, Range 1 East of
the Indian Meridian, 160 Acres at \$2.50 per acre, \$400.00

Fees:

Commissions	8.60
Testimony fees, 800 words at 15 cts per 100 words	1.20
Contest " " " " " " " "
Transcript of Records, " " " "
Interest on purchase price of land	26.05
Total	\$435.85

WILLIAM B. HODGE, JR.,
Receiver of Public Moneys.

Said answer is endorsed as follows:

"No. 3900. Emily F. Fearnow et al. vs. Luttie B. Jones et al.
Answer of Luttie B. & Elmer Jones. Filed in the District Court
Dec. 11, 1912. Fred C. Groshong, Clerk of District Court, G. P.
McIntyre, Deputy. J. F. King, Atty. for Defts."

Be it further remembered that on the 11th day of December, 1912, leave of court being first duly had, the said defendant The Phoenix Mutual Life Insurance Company filed in the office of the district court of Kay county, Oklahoma, and with said Clerk, its answer to the said petition which answer is in words and figures as follows:

In the District Court of Kay County, Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs.

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Comes now the said defendant, The Phoenix Mutual Life Insurance Co., a corporation under the laws of the State of Connecticut, and for its answer to the petition of the plaintiffs in said cause, denies each and every allegation in said petition contained, save and except as herein specifically admitted.

This defendant admits that the defendant, R. C. Fearnow refused and refuses to join with the plaintiffs in their petition herein, and that they made him a defendant in said petition.

37 Defendant admits that on the 29th day of March, 1899, Hollen H. Fearnow was a male citizen of the United States and more than 21 years of age. That on said date he made homestead entry in the United States Land Office at Guthrie, Oklahoma, upon the Southwest Quarter of Section Eleven, Township twenty-six North of Range One East of the Indian Meridian, in Kay county, Oklahoma, and went into possession of said premises, and that he died on the — day of October, A. D. 1905.

Defendant admits that on the 16th day of May, 1903 one Lena Barnes filed her contest affidavit against the said entry, and that on the 28th day of November, 1906, this defendant Luttie B. Jones, then Luttie B. Fearnow filed her homestead entry upon said land.

This defendant admits that thereafter the said Luttie B. Jones then Luttie B. Fearnow, made final proof upon said land and that thereafter on the 15th day of March, 1909, the United States of America issued to her a patent for said land, and the same was soon after delivered to her.

Defendant admits that the defendant Luttie B. Jones and Hollen H. Fearnow were married to each other on August 26th, 1901, at Wichita, Kansas, and that they were residents of Oklahoma. And admits that on the 28th day of November, 1906, she filed in the United States Land Office at Guthrie, Oklahoma, a relinquishment of the said Homestead Entry of Hollen H. Fearnow covering the above described premises.

This defendant further answering states that the land involved

in this case, to-wit: The Southwest Quarter of Section Eleven in Township twenty-six North of Range One East of the Indian Meridian, in Kay county, Oklahoma, was on the 29th day of March, A. D. 1899, vacant public land, belonging to the United States and subject to entry and being acquired under the Homestead Laws of the United States. That about three or four days previous to the said 29th day of March, A. D., 1899, the plaintiff Emily F. Fearnow and the said Hollen H. Fearnow made and entered into a verbal contract whereby it was mutually agreed and understood by and between them, that the said Emily F. Fearnow would give to

38 the said Hollen H. Fearnow a team of horses and a harness in consideration of which the said Hollen H. Fearnow was to and would file on the said land and would immediately settle upon and farm the said land and pay to said Emily F. Fearnow one-half of what crops he raised on said land in the year 1899, and one-third of the crops he raised on said land each and every year thereafter, and would prove said land up and obtain a patent from the United States for the same, in his own name as patentee and then deed the said land to the said Emily F. Fearnow. That in three or four days after said contract and agreement was made and entered into and in pursuance of and in accordance and compliance with his said contract the said Hollen H. Fearnow on to wit: the 29th day of March, A. D., 1899, did file upon and make Homestead Entry of the said land in the United States Land Office at Guthrie, Oklahoma, and he immediately delivered to said Emily F. Fearnow his filing papers for the same, the Receivers duplicate receipt, and did immediately settle upon the said land and continue to occupy and improve the said land and farm the same until the — day of October, A. D., 1905, on which date he died without having made final proof therefor, or having proved up the said land.

That the said Emily F. Fearnow did procure the said Hollen H. Fearnow to settle upon the said land with the intent thereafter of acquiring title thereto in herself, and said entry was not made for the use or benefit of said Hollen H. Fearnow, but illegally and for the use and benefit of said Emily F. Fearnow.

That the said Hollen H. Fearnow paid the rent of said land to the said Emily F. Fearnow.

That the defendant Luttie B. Jones and the said Hollen H. Fearnow were duly and legally married to each other on the 26th day of August, 1901, and she immediately went to live with the said Hollen H. Fearnow on the said land and resided thereon as her home continuously and improved the same from said date until the — day of —, 1910.

39 That on to-wit, May 16th, 1903, one Lena Barnes filed her affidavit of contest against the said entry of Hollen H. Fearnow in the United States Land Office at Guthrie, Oklahoma, charging that the said land was filed on by the said Hollen H. Fearnow for the purpose of speculation and was held for speculative purposes and not for the purpose of making it his home, and that he was holding it fraudulently, illegally and for the use and benefit of another person, to-wit, Emily F. Fearnow, and that for a valuable

consideration he had agreed and contracted with the said Emily F. Fearnow to prove up on said land and obtain a patent therefor, and then transfer the same to said Emily F. Fearnow, who is one of the plaintiffs in this case.

That a trial of the said contest was had before the Register and Receiver of the said land office on the 10th day of August, 1903 and on the 15th day of December, 1903, the said Register and Receiver rendered their decision thereon, holding and adjudging that the charges in the said contest affidavit were true. That said entry was not made for the use or benefit of said Hollen H. Fearnow, but was made for the use and benefit of said Emily F. Fearnow for the consideration and in pursuance of the contract above set out, and that the entry was "void from its inception and that no acts of the entryman after entry could make it valid," and cancelling said entry.

That thereupon the said Lena Barnes was by the order of the said Register and Receiver permitted to and did file on said land, and did make her homestead entry of said land under the Homestead Laws of the United States in said office for said land. That thereafter on the — day of October, 1905, the said Hollen H. Fearnow died, without having proved up said land, or having obtained patent for the same, leaving no child nor the descendant of any child of his surviving him, and leaving this defendant Luttie B. Jones, then Luttie B. Fearnow, his widow and only heir, surviving him.

That thereafter on to-wit: November 26, 1906, the said Lena Barnes in said Land Office dismissed and relinquished her
40 said filing and entry on said land, and dismissed and relinquished her said contest, and claim to said land, and thereafter on to-wit: the 28th day of November, 1906, the said land being land subject to Homestead Entry under the Homestead Laws of the United States, the defendant Luttie B. Jones, then Luttie B. Fearnow, filed on and made Homestead Entry upon and of said land in the United States Land Office at Guthrie, Oklahoma, the same being in the said Guthrie, Oklahoma, Land District. That at the time of making her said Entry she was a single woman, a native and citizen of the United States of America, over the age of 21 years, and was the owner of no land, nor had she at any time previous to said date been the owner of any land, nor had she at any time previous to her said Entry made Homestead Entry upon any of the lands of the United States, and was at the time of her said Entry a qualified entryman and Homesteader under the Homestead laws of the United States. That she continuously resided upon said land from the 26th day of August, A. D., 1901 to the — day of —, 1910.

That on the — day of July, 1908, she proved up on and made final proof upon the said land in the said Land Office. That she made improvements on, and cultivated the said land according to the laws of the United States and at the time of her said final proof had on said land the following large and substantial improvements, to-wit: A four room frame house, barn for four horses, with shed, well, a large orchard, good three and four wire fence all around the place,

about 100 acres broke, windmill, large hen house, buggy-shed, etc., and received her final receipt from said Land Office for said land, after paying the necessary fees and expenses and governmental charges and having complied in all matters and things with the laws of the United States, and the rules and regulations of its Land Department, the United States of America, by the President of the United States, did on the 15th day of March, 1909, make, issue and execute a patent to her as patentee for said land in her own right and not as the widow of Hollen H. Fearnow, conveying said land to her in fee simple, free and clear of any and all restrictions, conditions and limitations, and said patent was filed for

41 record in the register of deeds office of Kay county, Oklahoma, on April 6th, 1909, a full, true and correct copy of said patent is hereto attached, marked "Exhibit A" and made a part hereof, as fully and completely as though copied herein in full.

A copy of the said final receipt is hereto attached marked "Exhibit D" and made a part hereof.

This defendant for a further answer and defense to plaintiffs' petition states that it is and was at all times in this answer mentioned a corporation duly and legally incorporated, created and existing under the laws of the State of Connecticut, and hereby repleads each and every statement and allegation in this its answer hereinbefore pleaded, and further answering states that on to-wit: the 28th day of November, 1906, the said Luttie B. Jones, then Luttie B. Fearnow, being a qualified homestead entryman filed upon the land mentioned in plaintiffs' petition in the United States Land Office at Guthrie, Oklahoma, under the Homestead Laws of the United States, the same being subject to homestead entry thereunder and having made the improvements upon and resided upon the said land the required length of time as by said laws provided, and having made final proof thereon and paid to the government its full charges therefor, the government of the United States by and through its Receiver of said land office on to-wit: July the 22nd, 1908, issued to her a final receipt for said land, a full, true and correct copy of which is hereto attached, marked "Exhibit D" and made a part hereof.

That afterwards on to-wit the 10th day of August, 1908, the said Luttie B. Jones and Elmer Jones, her husband, made and executed to P. H. Albright their certain mortgage in writing upon said land whereby they did mortgage the said land to the said P. H. Albright to secure the payment of the sum of \$3,000.00 due August 1st, 1913, with interest thereon at the rate of five (5%) per cent per annum from August 1st, 1908, then borrowed by the said Luttie B. Jones of him and by him at said time paid over to her.

42 That said mortgage was duly filed for record in the office of the register of deeds of Kay county, Oklahoma, on the 1st day of August, 1908, and recorded in Book 34 of Mortgages, at page 87, a full, true and correct copy of said mortgage is hereto attached marked "Exhibit B" and made a part hereof. That thereafter on the 1st day of September, 1908, in consideration of

the sum of \$3,000.00 to him in hand paid by this defendant, the said P. H. Albright in writing sold, assigned, transferred and delivered the said mortgage and debt thereby secured to this defendant, which is now and ever since has been the lawful owner and holder of the same. That the said principal sum of \$3,000.00 is still wholly due and unpaid together with the interest thereon at the rate of — per cent from —, 19—. A copy of said assignment is hereto attached marked "Exhibit C."

That afterwards on to-wit the 15th day of March, 1909, the United States of America by its President, William H. Taft, executed a patent for said land to said Luttie B. Jones, conveying the said land in fee simple to her, her heirs and assigns, a full, true and correct copy of the said patent is hereto attached marked "Exhibit A" and made a part hereof as fully and completely as though copied herein in full and said patent was filed for record in the office of the register of deeds of Kay county, Oklahoma, on April 6th, 1909, and recorded in Book 30 of deeds at page 176, and that up to and including the 1st day of January, 1909, and for sometime thereafter neither the said P. H. Albright nor this defendant had any knowledge or information, actual or constructive that the said plaintiffs or any of them or any other person except the said Luttie B. Jones and Elmer Jones had or claimed any right, title, estate, interest or claim of, in or to said real estate or any part thereof and at the time of the execution of said mortgage and assignment, and the payment of their said moneys they were and are an innocent mortgagee and assignee thereof respectively for value, and believed in good faith the said Luttie B. Jones was the absolute owner in fee simple of all of the said land.

43 Wherefore, this defendant having fully answered, prays that the plaintiffs take nothing by their suit; that it go hence without day, and for its costs herein expended.

J. F. KING,

*Attorney for Defendant, The Phoenix
Mutual Life Insurance Company.*

"EXHIBIT A."

The United States of America, to all to whom these presents shall come, Greeting:

Guthrie, 0240. Certificate No. —.

Whereas, Luttie B. Jones, formerly Luttie B. Fearnow, has deposited in the General Land Office of the United States a Certificate of the register of the Land Office at Guthrie, Oklahoma, whereby it appears that full payment has been made by the said Luttie B. Jones according to the provisions of the Act of Congress of the 24th day of April, 1820, entitled "An Act making further provisions for the sale of the Public Lands," and the acts supplemental thereto, for the Southwest Quarter of Section Eleven in Township Twenty-six North of Range One East of the Indian Meridian, Oklahoma,

containing one hundred sixty acres, according to the Official Plat, of the Survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Luttie B. Jones.

Now Know Ye, That the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, Have Given and Granted and by these presents Do Give and Grant, unto the said Luttie B. Jones and to her heirs, the said Tract above described; To Have and to Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Luttie B. Jones, her heirs and assigns forever.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the 44 fifteenth day of March in the year of Our Lord, one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty third.

(G. L. O.)

[SEAL.]

By the President, WM. H. TAFT,

By

M. W. YOUNG,

Secretary.

H. W. SANFORD,

Recorder of the General Land Office.

Patent number —.

Recorded 51955, Vol. —, page —.

(Book 30 of Deeds, page 176. Filed April 6, 1909 at 1 P. M.)

“EXHIBIT B.”

This Mortgage, Made the first day of August, A. D. 1908, between Elmer Jones and Luttie B. Jones, his wife, of Kay county, and State of Oklahoma, parties of the first part and P. H. Albright of Cowley county, Kansas, party of the second part;

Witnesseth, That the said parties of the first part, in consideration of the sum of Three Thousand and no/100 dollars to them duly paid, have mortgaged and hereby mortgage to the party of the second part, his heirs and assigns, all the following described real estate and premises, situated in Kay county, and State of Oklahoma, to-wit:

The Southwest Quarter of Section Eleven (11), Township Twenty-six (26) North, Range One (1) east of the Indian Meridian, Kay county, Oklahoma, being 160 acres, with all improvements thereon and appurtenances thereunto belonging, and warrant the title to the same, and waive the appraisalment.

This mortgage is given to secure the payment of the principal sum of \$3000.00 with interest thereon according to the terms of one certain First Mortgage Note, made and delivered by said parties of the first part dated August 1, 1908 and payable to said party of the

second part five years after date, with interest at the rate of five per centum per annum, payable semi-annually, at The Mechanics' Savings Bank, Hartford, Connecticut.

Said parties of the first part agree to pay all taxes and assessments levied on said premises, and the interest represented by this
45 mortgage lien, and the debt secured thereby, promptly when due, and all sums necessary to protect the title and possession of said premises, and to keep the buildings on said premises insured against damage by fire in some company acceptable to said second party, for not less than \$—, with loss, if any, payable to the mortgagee, as his interest may appear, and on the failure of the parties of the first part to perform any of these agreements, the mortgagee, his heirs and assigns may pay all such sums, and the amounts so paid shall be a lien on said premises collectible in the same manner as the indebtedness hereby secured with interest at the rate of ten per centum.

If default be made in the payment of any part of the indebtedness hereby secured, either principal or interest, as stipulated in said notes, or any of them, or if any of the foregoing agreements are not performed, then all the indebtedness hereby secured shall, without notice, at the option of the party of the second part, become due and payable, and shall obtain interest at ten per centum until fully paid, and said mortgage may be foreclosed, and the above described premises sold in the manner prescribed by law, to pay all sums due said mortgagee as above set forth, together with interest and costs.

The foregoing conditions being performed, this mortgage to be void; otherwise, of full force and virtue.

In Witness Whereof, The parties of the first part have hereunto set their hands the day and year first above written.

ELMER JONES,
LUTTIE B. JONES.

STATE OF OKLAHOMA,
Kay County, ss:

Before me, a Notary Public in and for said county and State, on this first day of August, 1908, personally appeared Elmer Jones and Luttie B. Jones, his wife, to me known to be the identical persons described in and who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

46 In Testimony Whereof, I have hereunto set my hand and official seal the day and year last above written.

[SEAL.]

C. A. JOHNSON,
Notary Public.

My commission expires Feb. 27, 1911.

(Book 34 of Mortgages, page 87.

(Filed August 1, 1908, at 4:10 P. M. in the Register of Deeds Office, Kay County, Oklahoma. E. C. Denton, Register of Deeds.

"EXHIBIT C."

Know All Men By These Presents, That I, P. H. Albright, the mortgagee named in a certain mortgage bearing date the 1st day of August, 1908, made and executed by Elmer Jones and Luttie B. Jones, his wife, on the following described land in the county of Kay and State of Oklahoma, to-wit: Southwest Quarter of Section Eleven (11) Township Twenty-six (26) North, of Range One (1) East of I. M., being 160 acres, to secure the payment of \$3000.00, recorded in Volume 34 of Mortgages, on page 87, for value received, do hereby Sell, Assign, Transfer and Convey all my right, title and interest therein, and the debt secured thereby, to The Phoenix Mutual Life Insurance Company, Hartford, Conn.

In Witness Whereof, I have hereunto set my hand this 1st day of September, A. D., 1908.

P. H. ALBRIGHT.

STATE OF KANSAS,

Cowley County, ss:

On this 1st day of September, A. D., 1908, before me, the undersigned, a Notary Public within and for the county and state aforesaid, personally appeared P. H. Albright, to me personally known to be the same person who executed the above instrument of writing, as assignor, and duly acknowledged the execution thereof.

Witness my hand and official seal the day and year last above written.

[SEAL.]

GRANT STAFFORD,

Notary Public.

My commission expires August 2nd, 1911.

(Filed for record September 4, 1908 at 1:40 P. M. in the Register of Deeds office, Kay county, Oklahoma. E. C. Denton, Register of Deeds. Book 36, page 448.)

"EXHIBIT D."

47 Department of the Interior, General Land Office.

Receipt.

No. 123148.

U. S. LAND OFFICE:

GUTHRIE, OKLAHOMA, July 22, 1908. 19.

Received of Luttie B. Jones, Ponca City, Oklahoma, the sum of Four Hundred thirty-five dollars and eighty-five cents.

Purchase price of land, fees and commissions and interest in connection with commuted Homestead entry serial No. 0240 for Homestead Entry No. 14423.

said Emily F. Fearnow one half of what crops he raised on said land in the year 1899 and one-third of the crops he raised on said land each and every year thereafter, and would prove said land up and obtain a patent from the United States for the same, in his own name as patentee and then deed the said land to the said Emily F. Fearnow. That in three or four days after said contract and agreement was made and entered into and in pursuance of and in accordance and compliance with said contract, the said Hollen H. Fearnow on to wit the 29th day of March, A. D., 1899, did file upon and make Homestead Entry of the said land in the United States Land Office at Guthrie, Oklahoma, and he immediately delivered to the said Emily F. Fearnow his filing papers for the same, the Receivers duplicate receipt and did immediately settle upon said land and continue to occupy and improve the said land and farm the same until the — day of October, A. D., 1905, on which said date he died without having made final proof therefor, or having proved up on said land. That the said Emily F. Fearnow did procure the said Hollen H. Fearnow to settle upon the said land with the intent thereafter of acquiring title thereto in herself, and said entry was not made for the use or benefit of the said Hollen H. Fearnow but illegally and for the use and benefit of said Emily F. Fearnow."

Those words on page 4 of said answer, same being as follows, to wit:

"That said entry was not made for the use or benefit of said Hollen H. Fearnow, but was made for the use and benefit of said Emily F. Fearnow for the consideration and in pursuance of the contract above set out, and that the entry was "void from its inception and that no acts of the entryman after entry could make it valid."

Plaintiffs ask that said words and allegations be stricken from said answer upon the ground and for the reason that they constitute no defense whatever to plaintiffs' cause of action as pleaded in their petition; that — the pleading of the said allegations the defendant above named, attempts to raise immaterial issues; and that if said allegations remain in said answer the plaintiffs will be greatly prejudiced thereby, in that they will be put to great expense for the purpose of combatting said issues by having to procure depositions and record testimony in relation thereto.

Second. Plaintiffs further move the court to strike from the answer of the said defendant, The Phoenix Mutual Life Insurance Company, and all of pages 8, 9 and all of the portion of page 10 preceding the prayer of said answer and Exhibits B. and C. of said answer, upon the ground and for the reason that the allegations therein contained constitute no defense whatever to the cause of action as pleaded in plaintiffs' petition; that by the pleading of said allegations the defendant above named attempts to raise immaterial issues; that said statements so pleaded are surplusage, and if the defendant, Luttie B. Jones was not the equitable owner of the said premises she had nothing whatever to mortgage to the said defendant at the time of the execution of the mortgage therein referred to, the legal title to said premises at said time being

in the United States. The plaintiffs will be prejudiced by having to meet the issues so wrongfully tendered by said allegations in that they will have to go to the expense of preparing to offset said allegations by taking depositions and the like.

L. A. MARIS,
Attorney for Plaintiffs.

(NOTE.—The pages 2, 3 and 4 of this answer above referred to are shown on pages 21, 22 of the record, and the pages 8, 9, 10 thereof above referred to are shown on pages 24-25 of the record in this case, and exhibits B. and C. above referred to are shown on pages 27, 28-29 of said record.)

Endorsed with title and filed Dec. 18, 1912.

And be it remembered that on the same day, to-wit: December 8th, 1912, the plaintiffs file their motion to strike out certain portions of the separate answer of the defendants, Luttie B. Jones and Elmer Jones, which motion is in words and figures as follows, to-wit:

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

50 Come now the plaintiffs above named and move the court to strike from the answer of the defendants Luttie B. Jones and Elmer Jones the following portions of said answer:

(a) Those words on pages 2, 3, and 4, same being as follows, to-wit:

"That about three or four days previous to the said 29th day of March, A. D., 1899, the plaintiff Emily F. Fearnow and the said Hollen H. Fearnow made and entered into a verbal contract whereby it was mutually agreed and understood by and between them, that the said Emily F. Fearnow would give to the said Hollen H. Fearnow a team of horses and a harness in consideration of which the said Hollen H. Fearnow was to and would file on the said land and would immediately settle upon and farm the said land and pay to said Emily F. Fearnow one half of what crops he raised on said land in the year 1899 and one third of the crops he raised on said land each and every year thereafter, and would prove said land up and obtain a patent from the United States for the same, in his own name as patentee and then deed the said land to the said Emily F. Fearnow. That in three or four days after said contract and agreement was

made and entered into and in pursuance of and in accordance and compliance with said contract the said Hollen H. Fearnow on to-wit the 29th day of March, A. D., 1899 did file upon and make homestead entry of the said land in the United States Land Office at Guthrie, Oklahoma, and he immediately delivered to the said Emily F. Fearnow his filing papers for the same, the receivers duplicate receipt, and did immediately settle upon said land and continue to occupy and improve the said land and farm the same until the — day of October, A. D., 1905, on which said date he died without having made final proof therefor, or having proved up on said land. That the said Emily F. Fearnow did procure the said Hollen H. Fearnow to settle upon the said land with the intent thereafter of acquiring title thereto in herself, and said entry was not made for the use or benefit of the said Hollen H. Fearnow but illegally and for the use and benefit of said Emily F. Fearnow.

That the said Hollen H. Fearnow paid the rent of said land to said Emily F. Fearnow."

(b) Those words on page 4 of said answer, same being as follows, to-wit:

"That said entry was not made for the use or benefit of said Hollen H. Fearnow, but was made for the use and benefit of said Emily F. Fearnow for the consideration and in pursuance of the contract above set out, and that the entry was "void from its inception and that no acts of the entryman after entry could make it valid."

Plaintiffs ask that said words and allegations be stricken from said answer upon the ground and for the reason that they constitute no defense whatever to plaintiffs' cause of action as pleaded in their petition; that — the pleading of the said allegations the defendant above named attempts to raise immaterial issues; and that if said allegations remain in said answer the plaintiffs will be greatly prejudiced thereby, in that they will be put to great expense for the purpose of combatting said issues by having to procure depositions and record testimony in relation thereto.

51

L. A. MARIS,
Attorney for Plaintiffs.

Endorsed: No. 3900. Emily F. Fearnow et al. vs. Luttie B. Jones et al. Motion to Strike out portions of answer. Filed Dec. 18, 1912. Fred C. Groshong, Clerk.

And be it remembered that thereafter to-wit, on January 17, 1913, said date being a regular day of the December, 1912 term of the said court, said motions of the plaintiffs to strike out certain portions of the separate answer of the Phoenix Mutual Life Insurance Company, and to strike out certain portions of the separate answer of the defendants, Luttie B. Jones and Elmer Jones, came on for hearing. Argument of counsel was had. The court, after consideration of said motions overrules each of them to which the plaintiffs then and there duly excepted, and their exceptions was by the court allowed. The journal entry of the overruling of the said motions being in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

Case No. 3900.

EMILY F. FEARNOW et al., Plaintiffs,

vs.

LUTTIE B. JONES et al., Defendants.

Now on this 17th day of January, 1913, the same being one of the regular judicial days of the December, 1912 term of the above court, this cause comes on for hearing on the plaintiffs' motion to strike out certain portions of the answers of the defendants, Luttie B. Jones and Elmer Jones, and the Phoenix Mutual Life Insurance Company; the plaintiffs being present by their attorney L. A. Maris, and the said defendants being present by their attorney J. F. King. And the court after hearing the arguments of counsel and being fully advised in the premises finds that the said motions should be overruled.

It is therefore by the court ordered, adjudged and decreed that the motions of the said plaintiffs to strike out certain portions of the answers of the defendants Luttie B. Jones and Elmer Jones and the Phoenix Mutual Life Insurance Company should be, and the same are hereby overruled; to which ruling of the court the plaintiffs except and plaintiffs are given ten days in which to reply.

Be it further remembered, that thereafter, on February 24th, 1913, leave of court being first had, said plaintiffs filed their reply to the said answer of the defendants Luttie B. Jones and Elmer Jones in the office of the clerk of the District Court of Kay county, Oklahoma, and with said clerk, which is in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

No. 3900.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Reply of Plaintiffs to the Separate Answer of the Defendants, Luttie B. Jones and Elmer Jones.

Come now the plaintiffs above named and for their reply to the answer of the defendants, Luttie B. Jones and Elmer Jones, say:

First. They deny each, every and all of the allegations of new and defensive matter in said answer contained.

Second. Further replying plaintiffs admit that in the Lena Barnes Contest case referred to in said answer the Register and Receiver of the Land Office at Guthrie, Oklahoma, did on the 15th day of December, 1903, render their decision therein holding and adjudging that the Homestead Entry of Hollen H. Fearnow be cancelled; but plaintiffs allege that afterwards and before the death of said Hollen H. Fearnow by Letter "H" of January 20th, 1905, from the Commissioner of the General Land Office, all of the proceedings in said Lena Barnes contest case were set aside, including the said decision of the Register and Receiver cancelling the Homestead Entry of Hollen H. Fearnow, because of no legal service of notice of contest upon the said Hollen H. Fearnow, and that no further proceedings were had in said Lena Barnes Contest until November 28, 1906, at which time said Lena Barnes dismissed her said contest proceedings.

53

L. A. MARIS,
Attorney for Plaintiffs.

Said reply is endorsed as follows: No. 3900. Emily F. Fearnow et al. vs. Luttie B. Jones et al. Reply. I hereby consent that this reply may be filed out of time. ———, Attorney for Defendants. Filed 2/24/1913. Fred C. Groshong, Cl'k.

* * * * *

Be it further remembered that thereafter, on the 24th day of February, 1913, leave of court being first had, the said plaintiffs filed in the office of the clerk of the district court of Kay county, Oklahoma, and with said clerk, their reply to the said answer of the Phoenix Mutual Life Insurance Company, which reply is in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

No. 3900.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW, and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, Defendants.

Reply of Plaintiffs to the Separate Answer of the Phoenix Mutual Life Insurance Company.

Come now the plaintiffs above named, and for their reply to the answer of the defendant, The Phoenix Mutual Life Insurance Company, say:

First. They deny each, all and every of the allegations of new and defensive matter in said answer contained.

Second. Further replying plaintiffs admit that in the Lena Barnes Contest case referred to in said answer the Register and Receiver of the Land Office at Guthrie, Oklahoma, did on the 15th day of December, 1903, render their decision therein holding and adjudging that the Homestead Entry of Hollen H. Fearnow, be cancelled; but allege that afterwards and before the death of said Hollen H. Fearnow, by Letter "H" of January 20th, 1905, from the Commissioner of the General Land Office, all of the proceedings in said Lena

54 Barnes Contest were set aside, including the said decision of the said Register and Receiver cancelling the Homestead Entry of Hollen H. Fearnow, because of no legal service of notice of contest upon the said Hollen H. Fearnow; that no further proceedings were had in said Lena Barnes contest until November 28th, 1906, at which time said Lena Barnes dismissed her said contest proceeding.

L. A. MARIS,
Attorney for Plaintiffs.

Said reply is endorsed as follows: No. 3900. Emily F. Fearnow et al. vs. Luttie B. Jones et al. Reply. I hereby consent that this reply may be filed out of time. ———, Attorney for defendants. Filed 2/24/1913. Fred C. Groshong, Clk.

Be it further remembered that thereafter on to-wit the 21st day of April, 1913, the same being one of the regular judicial days of the April term 1913 of said court, the said cause came regularly on to be heard on the regular call of the docket. The said plaintiffs appeared by L. A. Maris, their attorney and the said defendants Luttie B. Jones, Emma Jones, and the Phoenix Mutual Life Insurance Company, appeared by J. F. King, their attorney, the said defendant, R. C. Fearnow appeared not, either in person or by attorney and said cause is tried to the court.

Thereupon the following proceedings were had.

The plaintiff offered and introduced evidence as follows:

Mr. Maris: If the court please we offer in evidence the written stipulation of the parties which is as follows:

Thereupon Mr. Maris reads to the court the said stipulation, which is in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, and Cecil Turner, Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW, and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Stipulation.

55 It is hereby stipulated and agreed by and between the plaintiffs and defendants in the above cause that the following are facts and may be read in evidence in the trial of said case by any of the said parties and on any trial between the said parties or any of them, their heirs, successors, assigns or personal representatives wherein the title to the real estate hereinafter described may be involved. The Southwest Quarter of Section Eleven (11) Township Twenty-six (26) North of Range One (1) East I. M. in Kay county, Oklahoma was on to-wit: the 29th day of March, 1899 vacant public land, acquired under the homestead laws of the United States. That about three or four days previous to said 29th day of March, 1899, one Hollen H. Fearnow, the son of said Emily F. Fearnow proposed to her that he would file on said land and prove up the same, under the said homestead laws, and would then deed the same to her for a team of horses and harness, and pay her the usual rent for said land, which she then stated to him she accepted; and it was then and thereupon mutually agreed orally by and between the said Emily F. Fearnow and the said Hollen H. Fearnow, that the said Emily F. Fearnow would give to the said Hollen H. Fearnow a team of horses and a harness, in consideration of which the said Hollen H. Fearnow was to, and would, file on said land, under the homestead laws of the United States, and would immediately settle upon, improve and farm the same as required by said laws, and would prove up said land and obtain a patent from the United States for the same in his name as patentee, and then deed the said land in fee simple to said Emily F. Fearnow, and would turn over and pay to her one-third of the crops he raised on said land in the year 1899, and one-third of the crops he raised thereon each and every year thereafter as rent. That in three or four days after said contract and agreement was made and entered into, and in pursuance of and compliance with his said contract, the said Hollen H. Fearnow on to-wit the 29th day of March, A. D., 1899, did file upon and make homestead entry No. 10171 of the said land, in the proper United States Land Office, to-wit: Perry, Oklahoma, and he immediately delivered to said Emily F. Fearnow his
 56 filing papers for the same, to-wit: The Receiver's duplicate receipt therefor, and did immediately settle upon the said land and continue to occupy and improve the said land and farm the same until the — day of October, A. D., 1905, on which date he died without having made final proof therefor, or having proved up the said land.

That on the 16th day of May, 1903, one Lena Barnes filed her affidavit of Contest against the said entry of said Hollen H. Fearnow in the United States Land Office at Guthrie, Oklahoma, charging that the said land was filed on by him for the purpose of speculation, and was held for speculative purposes, and not for the purpose of making it his home, and that he was holding it fraudulently, illegally and for the use and benefit of another person, to-wit:

Emily F. Fearnow, and that for a valuable consideration he had contracted and agreed with the said Emily F. Fearnow to prove up on said land and obtain a patent therefor, and then transfer the same to said Emily F. Fearnow, who is one of the plaintiffs in this case.

That a trial of the said contest was had before the register and receiver of the said office, on the 10th day of August, 1903, and on the 13th day of December, 1903, the said register and receiver rendered their decision thereon, holding and adjudging that the charges in the said contest affidavit were true; that said entry was not made for the use or benefit of the said Hollen H. Fearnow, but was made for the use and benefit of the said Emily F. Fearnow, for the consideration and in pursuance of the contract above set out, and that the entry was void from its inception, and cancelled said entry, and thereupon the said Lena Barnes was by the said register and receiver permitted to and did file on said land, and did make her homestead entry No. 13690 on Sept. 6, 1904, of said land under the homestead laws of the United States, in said office for said land. That an appeal was taken by the said Hollen H. Fearnow from said decision to the Commissioner of the General Land Office, where, and by whom on the 20th day of January,

57 1905, the notice of said contest was vacated, and another hearing thereof ordered, a copy of the said findings and decision of the Commissioner is hereto attached and made a part hereof. That no appeal was taken by the said Lena Barnes from the said order and decision of the said Commissioner and no further hearing was ever had on said contest, and said contest was not revived against the heirs of Hollen H. Fearnow after his death. That on the 26th day of November, 1905, said Lena Barnes dismissed her said contest and relinquished her said homestead entry on, and to said land. That thereafter on the 28th day of November, 1906, the defendant Luttie B. Jones, then Luttie B. Fearnow, filed a relinquishment of the homestead entry of Hollen H. Fearnow, and the same was filed by her, claiming to be the widow of the said Hollen H. Fearnow, and without the knowledge and consent of the plaintiffs in this action, or any of them, and without the knowledge and consent of the defendant R. C. Fearnow. That thereafter and on the same day, November 28, 1906, the said Luttie B. Jones, then Luttie B. Fearnow, filed her homestead entry No. 14423 on said land, in the United States Land Office at Guthrie, Oklahoma; that at said time she was an unmarried female over the age of 21 years, a native born citizen of the United States, and was the owner of no land, nor had she at any time previous thereto been the owner of any land, nor had she at any time previous to her said entry made homestead entry upon any of the lands of the United States, and was at the time of her said entry a qualified entry woman and homesteader, under the homestead laws of the United States. That afterwards on December 12, 1906, the said plaintiffs filed their contest affidavit in said land office against the said entry of the said Luttie B. Jones, then Luttie B. Fearnow and that a true and correct copy of the same is attached to plaintiffs'

petition, under mark of "Exhibit A." That on January 5th, 1907, the United States Land Office at Guthrie, Oklahoma, rejected said contest affidavit as insufficient, and rendered a decision in favor of the contestee, then Luttie B. Fearnow, now the said defendant, Luttie B. Jones, a true and correct copy of which decision is attached to plaintiffs' petition, under mark of "Exhibit X." That the said contestants appealed from said decision to the Commission of the General Land Office, and the said Commissioner on May 58 13, 1907, affirmed the said decision; a full, true and correct copy of the said decision of said Commissioner is attached to plaintiffs' petition, under mark of "Exhibit B." That the said contestants duly appealed from the said decision of the Commissioner of the General Office to the Secretary of the Interior, and on the first day of September, 1907, Jesse E. Wilson, acting Secretary of the Interior, affirmed the said decision of the Commissioner of the General Land Office, a full, true and correct copy of the said decision of the said acting Secretary affirming the said decision of the Commissioner of the General Land Office is attached to plaintiffs' petition under mark of "Exhibit C." That said Hollen H. Fearnow and the said Luttie B. Jones were first cousins by blood, the fathers of the said parties being brothers. That on August 26th, 1901, at Wichita, State of Kansas, the said Hollen H. Fearnow, deceased, and the said Luttie B. Fearnow were married to each other, and they were both on the said 26th day of August, 1901, residents of the Territory of Oklahoma. That the law of the State of Kansas then in force, and now in force, is as follows to-wit: "All marriages between parents and children including grand parents and grand children of any degree, between brothers and sisters of the half blood, as well as the whole blood, and between uncles and nieces, aunts and nephews, and first cousins are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations." Act of May 27th, 1867, Section 2. That the said Luttie B. Fearnow resided and lived with the said Hollen H. Fearnow on the said described land from the said 26th day of August, 1901 to the said date of the death of the said Hollen H. Fearnow. And she continued to reside upon and cultivate and improve the said land, from the time of the death of the said Hollen H. Fearnow up to the — day of —, 1910, and that at the time of making her final proof on the said land, she had more than the requisite amount of improvements thereon, required under the homestead laws of the United States. That the mortgage of the defendant, The Phoenix Mutual Life Insurance Company, set forth in its answer in said cause, and a copy of which is thereto attached under mark 59 "Exhibit B," is unpaid in the full amount of the principal sum thereof, \$3000.00 and interest thereon at the rate of 5 per cent per annum from February 1st, 1913.

That up to and including the time of the purchase of said mortgage by said Phoenix Mutual Life Insurance Company and the payment of \$3,000.00 therefor by said company, it had no actual notice that

the said plaintiffs or any of them claimed any right, title or interest in said real estate.

That the plaintiffs are all citizens of the United States, were such at the time of the filing of the said contest and have been such at all times since.

That immediately after making said homestead entry No. 10171 upon said premises, the said Hollen H. Fearnow went into the possession thereof and resided thereon and cultivated the same from said time, to-wit: from March 29, 1899 until said date of his death, to-wit: October 23, 1905; that during the said term of his residence thereon he made many lasting and valuable improvements upon said premises, and in said respects as to residence, cultivation and improvements fully complied with the homestead laws of the United States necessary to entitle him to make final proof and receive patent from the United States to said premises.

That patent for said premises was issued by the United States to said Luttie B. Fearnow, now Jones, on March 15, 1909, and prior to the commencement of this action.

That on March 29th, 1899, the date of the making of said homestead entry No. 10171 by the said Hollen H. Fearnow, that he, the said Hollen H. Fearnow, was a male citizen of the United States, more than 21 years of age; that he was the owner of no land nor had he at any time previous to said date made homestead entry upon any of the public lands of the United States and that he was in no way disqualified from making homestead entry under the public land laws of the United States, unless the facts above noted disqualified him.

That the plaintiffs and the defendant R. C. Fearnow, are related to the said Hollen H. Fearnow, deceased, as follows:

60 a. The plaintiff Emily F. Fearnow, is the mother of the said Hollen H. Fearnow;

 b. That the plaintiff, Emma F. Doepel, is the sister of the said Hollen H. Fearnow;

 c. That the plaintiff Richard T. Fearnow and the defendant R. C. Fearnow are brothers of the said Hollen H. Fearnow;

 d. That the plaintiffs Ethel T. Turner, Hilary Turner, Lester Turner, and Cecil Turner are niece and nephews of said Hollen H. Fearnow, they being daughter and sons of — Turner, deceased, who was the sister of the said Hollen H. Fearnow, and who died prior to the time of his death;

 e. That plaintiff, Toledo Chamberlain is a niece of said Hollen H. Fearnow, she being the daughter of — Chamberlain, deceased, who died prior to the time of the death of said Hollen H. Fearnow; and who was his sister;

 f. That plaintiff Walter D. Hadley is a nephew of the said Hollen H. Fearnow, he being the son of — Hadley, who was the sister of the said Hollen H. Fearnow and who died prior to the time of his death;

 g. That plaintiffs Neva McGrew, Grace McGrew, Violet McGrew and Ralph McGrew are nieces and nephew of the said Hollen H. Fearnow, they being the daughters and son of one — McGrew who

was the sister of the said Hollen H. Fearnow, and who died prior to the time of his death;

h. That at the time of his death the father of the said Hollen H. Fearnow was dead, and that he, the said Hollen H. Fearnow left surviving him no sons or daughters, no lineal descendants, no brothers or sisters, or lineal descendants of any deceased brothers or sisters, other than those above named.

That all the facts admitted by the pleadings in said action to be true shall be considered by the court as facts in this action, and that all of the above mentioned facts shall be considered in connection with the pleadings in the case.

L. A. MARIS,
Attorney for Plaintiffs.
J. F. KING,
Attorney for Defendants.

1 Copy.

"H."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, F. M.
WASHINGTON, D. C., January 20, 1905.

W. B. N.

55743—1904.

Involving H. E. No. 10171.

LENA BARNES
v.
HOLLEN H. FEARNOW.

Register and Receiver, Guthrie, Oklahoma.

SIRS: On March 29, 1899, Hollen H. Fearnow made H. E. No. 10171, for the S. W. $\frac{1}{4}$ Sec. 11, Tp. 26 N. R. 1 E.

On May 16, 1903, Lena Barnes filed her affidavit of contest against said entry, alleging that said land was filed on by the said Hollen H. Fearnow for the purpose of speculation and that the said land is held by the said Hollen H. Fearnow for speculative purposes and not for the purpose of making it his home; that the said Hollen H. Fearnow is holding said land fraudulently and illegally for the use and benefit of another person; that for a valuable consideration, namely, one team of horses and \$40.00 set of harness and some money, he has agreed and contracted to prove up on said land and obtain a deed or patent and then to transfer the same to another person, namely Mrs. Emily F. Fearnow; said contract and agreement be (ing) oral and made in 1899.

Contest notice was issued, appointing August 10, 1903 as the day for the submission of testimony before you.

On the day appointed in such notice the plaintiff appeared before you, personally and by attorney. The defendant appeared, specially by attorney, for the purpose of moving that you quash the proof of service of the notice of contest in the case for that the affidavit of service is sworn to before the attorney for the contestant in this cause.

You overruled said motion, to which action the defendant excepted. You then upon the motion of plaintiff, allowed the latter five days within which to cure the defect above complained of, in the proof of service of notice of contest, and permitted him at once to proceed with the examination of his witnesses, stating to the defendant that he would be allowed a reasonable time within which to produce his witnesses; whereupon he withdrew from further participation in the trial.

The plaintiff was afterwards granted an additional period of five days within which to file proper proof of service of notice of contest, which she did, within the time so allowed, showing that the defendant was personally served with such notice on June 25, 1903, by one W. B. Martin.

The testimony submitted by the plaintiff showed, in substance, that prior to the date of Fearnow's entry, his sister had made a homestead entry of the land embraced therein; that before making her said entry this sister had purchased the relinquishment of an entry of said land, then existing, for which she paid four or five
62 hundred dollars, furnished by her mother; that she verbally agreed with her brother, the defendant, that he should make entry of the land, hold the same for fourteen months, make final proof therefor, and deed the tract to his said mother in exchange for a wagon, harness and team of horses; or in the event she and her mother did not desire him to so make final proof, that he would pay to his mother rent for the land; that defendant paid such rent for two years, and then refused to longer do so; that there was much bad feeling existing between defendant and other members of his family; and that the plaintiff was a sister, other than the one who had purchased the relinquishment, as aforesaid.

You found the facts to sustain the charges of the affidavit of contest, and recommended that said entry be cancelled, by your decision which is dated December 15, 1903.

On January 5, 1904, the defendant, appearing specially, for that purpose only, filed a motion, of which the plaintiff's attorney had accepted service, to set aside all proceedings had in the case, on the ground that he had never been served with proper notice of contest therein, and, in support of said motion attached to it the paper served upon him as a copy of such notice, together with the affidavits of the officer who served the same and of himself. Said paper was identical with the original notice of contest in the case, except that it was not signed by either the Register or Receiver. The affidavits referred to unequivocally identified said paper as the copy of the notice of contest served upon the defendant on June 25, 1903.

On January 21, 1904, defendant's attorney filed an affidavit in support of the motion filed on January 5, 1904, in which he alleged that he first saw said paper which purported to be a copy of the notice of contest in this case on or about September 10, 1903; that he then attempted to secure the affidavit of said W. B. Martin, who made the proof of service of notice of contest above alluded to, that the same was the identical paper he had served upon the defendant; that said

63 Martin was, as he understood, "a constable, game warden and posseman or deputy marshal," who traveled practically all of the time in the Osage and other reservations, making it difficult to "catch" him; that on one occasion affiant had heard where Martin was and telephoned a friend to hold him there until he could arrive; that he took the first train to that point, but Martin had left about an hour before the arrival of the train; that he had stated the situation to the Register of your office "about the last of September or sometime in October," and assured said Register that diligence would be used to make up the showing in support of such motion, which had been done; that he, affiant, knew the nature of defendant's defense to this contest, and the witnesses and facts upon which the defense was based; that such defense was a meritorious one; that the case-made by the plaintiff could, as he verily believed, be completely disproved, and the fact established that the entry was made in good faith; that the witnesses who testified for the plaintiff were extremely hostile to the defendant; that his father and mother are deeply and financially interested in this contest; that his mother has instigated this case and his father defrayed part, if not all of the expenses thereof; that both of these persons are witnesses whose reputation for truth and veracity is very bad and that their neighbors will not believe them under oath.

On January 21, 1904, you overruled the motion to set aside the proceedings herein, stating that had it been made at the time the case was called for trial, you would have sustained the same; that all defects in the notice, not set forth in the motion that day filed by defendant, had been waived by him, and that he should not be permitted at that late day to come in and set aside all of the proceedings of an expensive trial upon a ground which should have been presented when the notice was first attacked.

Notice of your decisions of December 15, 1903 and of January 21, 1904, was served upon the defendant by registered letter, mailed to him on January 23, 1904, which he received on January 26, 1904.

On January 26, 1904, the defendant appearing specially, for that purpose only, filed what is termed "contestee's exception to overruling of motion."

64 On March 3, 1904, the defendant filed a motion for rehearing, accompanied by his affidavit that the same was made in good faith and not for the purpose of delay, and the affidavit of his attorney of record (attached to the registry receipt for the letter) that a true copy of said motion had been mailed to defendant's attorneys of record on March 2, 1904.

On March 3, 1904, you overruled said motion for rehearing.

On March 23, 1904, you transmitted the record in the case.

On July 25, 1904, you reported, in response to letter "H" of July 24, 1904, that no appeal had been filed by the defendant from your decision in this case.

By Letter "H" of August 18, 1904, defendant's H. E. No. 10171 was cancelled and the case closed. In said letter the facts in the case were stated, substantially, as hereinbefore set forth.

On August 30, 1904, defendant, by his attorney of record, accepted service of notice of the decision of this office of August 18, 1904.

On September 6, 1904, the plaintiff made H. E. No. 13690, for the land involved herein.

On September 28, 1904, the defendant filed a motion for review of the decision of this office, dated August 18, 1904 (of which motion plaintiff's attorney of record had accepted service), upon the ground that

said decision was * * * rendered while said cause was pending in said local office, and before this contestant's time for filing an appeal had expired, and at a time when he was nowise apprised of the fact that the cause was pending in your Honor's office or under consideration there; that, in truth and in fact, his time for an appeal had not expired; that he had never been notified in any manner of the decision of the local officers upon his motion for review and reconsideration of their decision upon the merits of the cause herein, which said facts appear by the record of said local office.

Said motion for review was accompanied by the affidavit of defendant's attorney of record that the same was made in good faith and not for the purpose of delay.

On September 28, 1904, the date of the filing of said motion for review, the defendant filed, also, an appeal from your decision of December 15, 1903, with specification of error, of which the plaintiff's attorneys of record had accepted service. Said appeal was indorsed by the Receiver "Rejected because not filed in time."

On December 24, 1904, the plaintiff's attorney of record filed a reply to the motion for review filed on September 28, 1904 in which he urged that inasmuch as your decision of March 3, 1904, overruling the motion for a rehearing that day filed, was rendered in open court, in the presence of defendant's attorney, your failure to give him written notice thereof was immaterial. With said "reply" was filed the affidavit of plaintiff's attorney alleging that defendant's attorney was present in open court, when your said decision of March 3, 1904 was rendered.

By letter of December 27, 1904, you transmitted the motion for review and appeal, filed on September 28, 1904, and said "reply" by plaintiff to such motion.

The defendant was entitled to notice in writing of your decision denying his motion for a rehearing, (Rule of Practice 17) and was not required to appeal from your decision upon the merits until such notice had been given (Rule of Practice 79). It follows that the action of this office in cancelling his entry and closing the case by letter "H" of August 18, 1904, was erroneous, and said letter is hereby vacated and set aside.

No jurisdiction of a defendant can be acquired without service upon him of notice of contest. A paper purporting to be such notice, but not signed by the Register and Receiver, nor by one of them, is a nullity (Rule of Practice 8). The proof of service of notice of contest in this case is the affidavit of Martin alone; his subsequent affi-

davit and the copy of the alleged notice served upon the defendant leave no reason for doubt that your office was without jurisdiction to try the issues involved in this contest. The defendant waived no rights by his special appearance at the hearing of his failure to make a sufficient objection to such notice, at that time; the question of notice may be raised at any time, and when raised, or apparent upon the face of the record, cognizance must be taken thereof.

66 Watson v. Morgan et al., 9 L. D. 75; Van Brunt v. Hammon, 9 L. D. 561.

I have, therefore, this day set aside all the proceedings had before you in the premises, and you are hereby directed to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690, which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. No. 10171 reinstated.

Advise the parties in interest hereof and plaintiff of her right of appeal, and in due season report all action taken in the premises.

Respectfully,

J. H. FIMPLE,
Assistant Commissioner.

M. J. V.

(The above and foregoing stipulation is endorsed as follows: Emily F. Fearnow et al. v. Luttie B. Jones et al. Stipulation. Filed in the District Court April 5, 1913. Fred C. Groshong, Clerk of the District Court.)

Mr. Maris: I now offer the petition in this case; there were some exhibits referred to there. The plaintiff offers in evidence exhibit "A" which is a copy of the contest affidavit referred to in the stipulation just read and admitted to be a true and correct copy of the same in said petition. Exhibit 'B' is a copy of the order and judgment of R. A. Ballinger, Commissioner of Indian Affairs, in regard to homestead entry number 10171, which exhibit was referred to in the stipulation just read; Exhibit C, which is a copy of the decision of the Secretary of the Interior referred to in the stipulation just read, and Exhibit X, which is a copy of the order of L. N. Houston and William B. Hodge, Register and Receiver respectively of the Land Office at Guthrie, Okla., dated January 5, 1907, which is referred to in the stipulation just read; said exhibits all being exhibits attached to the petition of plaintiffs in this action.

Does the court want them read?

The Court: Oh, no.

67 A full true and correct copy of the said petition, Exhibit A., Exhibit B, Exhibit C, and Exhibit X, is set out and given at pages 4-13 of this record.

Judge Maris: Well, we rest.

Thereupon the said defendants, Luttie B. Jones, Elmer Jones, and

the Phoenix Mutual Life Insurance Company offered and introduced evidence as follows:

Judge King: I will ask the register of deeds to take the stand. I want to introduce the patent and mortgage and the final receipt.

Judge Maris: I will admit all that and I will admit anything you say about them.

Judge King: Well, if your honor please, I want to give it formally in the record, it won't take but a short while.

Thereupon, W. R. STRANGE being first duly sworn to testify the truth the whole truth and nothing but the truth in the said case, takes the stand as a witness in behalf of the said defendants and testifies as follows, to-wit:

Direct examination.

By Judge King:

Q. State your name.

A. W. R. Strange.

Q. What, if any official position do you hold in this county?

A. Register of deeds.

Q. Of Kay county, Okla.?

A. Kay county, Okla.

Q. As such register of deeds have you in your possession the books, records and papers of that office?

A. Yes sir.

Q. Have you in your possession book 30?

The Court: Just introduce them as to what they are; there is no use to read them into the record.

Judge King: Just a moment. I will ask you if you have in your possession book 30 of that office?

A. Yes sir.

Q. Is that it you hold in your hand?

A. Yes sir.

68 Q. Have you got book 6 of Miscellaneous records of that office there?

A. Yes sir; I have got it right here.

Q. Have you book 34 of Mortgages of the records of that office?

A. Yes sir.

Q. Is it right there?

A. Yes sir.

Q. Have you got book 36, number 36 of that office containing assignments?

A. Yes sir.

Q. Is that it you hold in your hand?

A. Yes sir.

Judge King: I presume that is sufficient for the identification of the books, if your honor please.

If your honor please, we offer in evidence—Mr. Strange, I will ask you to turn to page 176 of book 30.

We now offer in evidence page number 176 of this book number 30 being the patent from the United States of America to Luttie B. Jones for the land in question.

Now I will ask you to turn to page 562 of the Miscellaneous record number 6, which you have just identified. Is that it there?

A. Yes sir.

Judge King: We now offer in evidence page 562 of this miscellaneous record 6, being the final receipt from the United States of America to Luttie B. Jones for the land in question.

Q. I will ask you to turn to page 87 of mortgage record number 34?

A. Page 87?

Q. 87 is that it.

A. Yes sir, page 87.

Judge King: We offer in evidence page 87 of this record number 34 of mortgages. I now ask you to turn to page 448 of record number 36 that you just identified, is that it?

A. 448, yes sir.

Q. Yes?

A. Yes sir.

Judge King: We now offer in evidence the last part of this page 448 being the assignment of the mortgage which has just been offered in evidence from P. H. Albright to the Phoenix Mutual Life Insurance Company.

Judge King: That is all.

The Court: Any cross-examination?

Mr. Maris: No.

Thereupon Judge King read to the court the said records which are in words and figures as follows:

The United States of America to all whom these presents shall come, Greeting:

Guthrie 0240. Certificate No. --.

Whereas, Luttie B. Jones, formerly Luttie B. Fearnow, has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Guthrie, Oklahoma, whereby it appears that full payment has been made by the said Luttie B. Jones, according to the provisions of the Act of Congress of the 24th day of April, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto for

The Southwest Quarter of Section eleven in Township twenty-six north of Range one east of the Indian Meridian, Oklahoma, containing one hundred sixty acres, according to the official plat of the

survey of the said lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Luttie B. Jones;

Now Know Ye, That the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, Have Given and Granted, and by these presents Do Give and Grant unto the said Luttie B. Jones, and to her heirs, the said tract above described; To Have and To Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Luttie B. Jones and to her heirs and assigns forever.

In testimony whereof, I, William H. Taft, President of the
70 United States of America, have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the fifteenth day of March, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty third.

[G. L. O. SEAL.] By the President WM. H. TAFT,
By M. W. YOUNG, *Secretary*.
H. W. SANFORD,
Recorder of the General Land Office.

Patent number Recorded 51955, Vol. — page —.

(Filed for record April 6, 1909 at 1: p. m. Document No. 52564. Recorded in Book 30 of Deeds, page 176.

Department of the Interior,
General Land Office.
No. 123148.

Receipt.

U. S. LAND OFFICE, GUTHRIE, OKLAHOMA,
July 22, 1908. 19

Received of Luttie B. Jones, Ponca City, Oklahoma, the sum of Four Hundred thirty-five dollars and eight-five cents,

Purchase price of land, fees and commissions and interest in connection with Commuted Homestead entry Serial No. 0240, for Homestead entry No. 14423, S. W. $\frac{1}{4}$, Section 11, Township 26 North, Range 1 East Indian Meridian, 160 Acres at \$2.50 per acre \$400.00

Fees:

Commissions	8.60
Testimony fees 800 words at 15 cts. per 100 words	1.20
Contest " " " " " " " "
Transcript of Records, cts. " " " "
Interest on purchase price of land	26.85
Total	435.85

WILLIAM B. HODGE, JR.,
Receiver of Public Moneys.

(Filed August 1, 1908 at 4:00 P. M. E. C. Denton, Register of Deeds. Document No. 49643. Recorded in Miscellaneous Record 6, page 562.)

71 This Mortgage, made this first day of August, A. D., 1908, between Elmer Jones, and Luttie B. Jones, his wife, of Kay county and State of Oklahoma, parties of the first part, and P. H. Albright, of Cowley county, Kansas, party of the second part:

Witnesseth: That the said parties of the first part, in consideration of the sum of Three Thousand and no/100 dollars, to them duly paid, have mortgaged and hereby mortgage to the party of the second part, his heirs and assigns, all the following described real estate and premises, situated in Kay county and State of Oklahoma, to-wit :

The Southwest Quarter of Section Eleven (11), Township Twenty-six (26) North, Range One (1) East of the Indian Meridian, Kay County, Oklahoma, being 160 acres, with all improvements thereon and appurtenances thereunto belonging, and warrant the title to the same, and waive the appraisalment.

This mortgage is given to secure the payment of the principal sum of \$3,000.00 with interest thereon according to the terms of one certain First Mortgage Note, made and delivered by said parties of the first part dated August 1, 1908, and payable to said party of the second part five years after date, with interest at the rate of five per centum per annum, payable semi-annually, at The Mechanics' Savings Bank, Hartford, Connecticut.

Said parties of the first part agree to pay all taxes and assessments levied on said premises, and the interest represented by this mortgage lien, and the debt secured thereby promptly when due, and all sums necessary to protect the title and possession of said premises, and to keep the buildings on said premises insured against damage by fire in some company acceptable to said second party, for not less than \$——, with loss, if any, payable to the mortgagee, as his interest may appear, and on the failure of the parties of the first part to perform any of these agreements, the mortgagee, his heirs and assigns, may pay all such sums and the amounts so paid shall be a lien on said premises collectible in the same manner as the indebtedness hereby secured with interest at the rate of ten per centum.

If default be made in the payment of any part of the indebtedness hereby secured, either principal or interest, as stipulated in said notes, or any of them, or if any of the foregoing agreements are not performed, then all the indebtedness hereby secured shall, without notice, at the option of the party of the second part, become due and payable, and shall obtain interest at ten per centum until fully paid, and said mortgage may be foreclosed and the above described premises sold in the manner prescribed by law, to pay all sums due said mortgagee as above set forth, together with interest and costs.

The foregoing conditions being performed, this mortgage to be void; otherwise, of full force and virtue.

In Witness Whereof, the parties of the first part have hereunto set their hands the day and year first above written.

ELMER JONES.

LUTTIE B. JONES.

STATE OF OKLAHOMA,

Kay County, ss:

Before me, a Notary Public in and for said county and State, on this first day of August, 1908, personally appeared Elmer Jones and Luttie B. Jones, his wife, to me known to be the identical persons described in and who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year last above written.

[SEAL.]

C. A. JOHNSON,

Notary Public.

My commission expires Feb. 27, 1911.

(Filed for record August 1, 1908, at 4:10 p. m. Document No. 49644. Vol. 34 of Mtgs. pg. 87.) Loan No. 7472.

72 Know All Men By These Presents, That I, P. H. Albright, the mortgagee named in a certain mortgage bearing date the 1st day of August, 1908, made and executed by Elmer Jones and Luttie B. Jones, his wife, on the following described land in the county of Kay and State of Oklahoma, to-wit:

Southwest Quarter of Section Eleven (11) Township of Twenty-six (26) North of Range One (1) East of I. M., being 160 acres, to secure the payment of \$3,000.00, recorded in Volume 34 of Mortgages, on page 87, for value received, do hereby sell, assign, transfer and convey all my right, title and interest therein, and the debt secured thereby to The Phoenix Mutual Life Insurance Company, Hartford, Conn.

In Witness Whereof, I have hereunto set my hand this 1st day of September, A. D., 1908.

P. H. ALBRIGHT.

STATE OF KANSAS,
Cowley County, ss:

On this 1st day of September, A. D., 1908, before me, the undersigned, a Notary Public within and for the county and State aforesaid, personally appeared P. H. Albright, to me personally known to be the same person who executed the above instrument of writing, as assignor, and duly acknowledged the execution thereof.

Witness my hand and official seal the day and year last above written.

[SEAL.]

GRANT STAFFORD,
Notary Public.

My commission expires August 2nd, 1911.

(Filed for record September 4, 1908 at 1:40 p. m. Document No. 49943. Recorded in Volume 36 of Mortgages, page 448.)

Judge King: I presume you will agree that at the time of the execution of this mortgage, P. H. Albright had no actual notice of any claim of these plaintiffs?

The Court: That is admitted, isn't it?

Judge King: I think it is if your honor please.

Judge Maris: Oh, yes; I will agree to that; it makes no difference.

73 The Court: That seems to be admitted in your stipulation.

Judge King: It is admitted that P. H. Albright, the original mortgagee in this mortgage, had no notice of the claims of the plaintiffs in this case; no actual notice.

Judge King: We rest.

The above and foregoing is all the evidence offered or introduced in the trial of said cause.

Thereupon the said cause is argued to the court and at the conclusion thereof the court takes the same under advisement. And afterwards on August 11, 1913, the same being an adjourned day of the April term, 1913 of said court, the court announces in open court that the said cause would be held under advisement until the next term of court, and afterwards to-wit: on September 1st, 1913, the same being a regular day of the September Term, 1913, of said court, the said parties appeared as at the trial of said cause, the court rendered judgment in said cause in favor of the plaintiffs and against the defendants, Luttie B. Jones, Elmer Jones, and the Phoenix Mutual Life Insurance Company for the relief as prayed for in said petition to which the said defendants Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company, then and there at the time each separately except-

A full, true and correct copy of the journal entry of the judgment and decree of the court in said cause is in words and figures as follows, to-wit:

In the District Court of Kay County, State of Oklahoma.

Case No. 3900.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs,

VS.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Journal Entry.

This cause coming on for trial this 21st day of April, 1913
74 said date being a regular day of the April, 1913, term of the said court, pursuant to previous setting and notice, the plaintiffs appeared by their attorney, L. A. Maris and the defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company appeared by their attorney, J. F. King. Both parties announce ready for trial; and a jury having been waived, the court directs that the trial proceed to the court without a jury.

And thereupon said parties introduce their evidence and rest. The court declares the case closed. Argument of counsel is had and leave is given counsel for the respective parties to submit briefs and the court takes the case under advisement. On Aug. 11, 1913, said date being a regular day of the April, 1913 Term of the said Court, the court announces in open court that the cause will be held under advisement until the next term, to-wit: until the September, 1913 term of the said court. And on September 1st, 1913, said date being a regular day of the September, 1913 term of the said court, said parties appearing as at the trial of the said cause as above stated, the court finds the issues in favor of the plaintiffs and renders judgment in said cause in favor of the plaintiffs and against the defendants for the relief as prayed for in plaintiff's petition; to which said defendants, by their counsel, then and there duly except and their exception is allowed by the court.

It is therefore considered, ordered, adjudged and decreed that the plaintiffs and the defendant, R. C. Fearnow, are the sole and only heirs of Hollen H. Fearnow, deceased; the Homestead entryman mentioned in plaintiffs' petition; that the plaintiffs and the defendant R. C. Fearnow, are the owners in fee simple of the premises described in plaintiffs' petition, to-wit:

The Southwest quarter (S. W. $\frac{1}{4}$) of Section eleven (11), Township Twenty-six (26) North of Range One (1) East, of the Indian Meridian, in Kay county, State of Oklahoma; and that the defendant, Luttie B. Jones, holds the legal title to the same in trust for the said owners thereof;

75 That the said Emily F. Fearnow, Emma F. Doepel, R. C. Fearnow, Richard T. Fearnow, Toledo Chamberlain and Walter D. Hadley each own an undivided one-eighth ($\frac{1}{8}$) of

said described premises, and that the said Neva McGrew, Grace McGrew, Ralph McGrew, Violet McGrew, Ethel Turner, Hilary Turner, Lester Turner and Cecil Turner each owns an undivided one thirty-second ($1/32$) of said premises.

It is further considered, ordered, adjudged and decreed that the defendants, Luttie B. Jones and Elmer Jones shall make a good and sufficient deed conveying said premises to said owners thereof.

It is further considered, ordered, adjudged and decreed that the mortgage given by the defendants, Luttie B. Jones and Elmer Jones to P. H. Albright dated August 1st, 1908, and filed for record August 1st, 1908 in the office of the register of deeds of Kay county, Oklahoma, and recorded in said office in Book 34 of mortgages at page 87; which said mortgage was afterward, to-wit: on the first day of September, 1908, assigned by said P. H. Albright to the defendant, the Phoenix Mutual Life Insurance Company, does not constitute any lien or incumbrance upon said premises and that said mortgage be cancelled, set aside and held for naught.

It is further considered, ordered, adjudged and decreed that the plaintiffs have and recover from the defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company the costs of this suit, taxed in the sum of \$—.

W. M. BOWLES, *Judge*.

O. K.

L. A. MARIS,

Attorney for Plaintiffs.

O. K.

J. F. KING,

*Attorney for Defendants, Luttie B. Jones,
Elmer Jones and Phoenix Mutual Life Insurance Company.*

Endorsed: No. 3900. Fearnow vs. Jones, Jr. Entry. April 21, 1913. Filed Oct. 28, '13. Fred C. Groshong, Clk.

Be it further remembered that thereafter on September 2, 1913, the said defendants, Luttie B. Jones and Elmer Jones filed their motion for a new trial in said cause and on the same day, September 2, 1913, the said defendant, the Phoenix Mutual Life Insurance Company filed its motion for a new trial in the said cause. Said motions and the endorsements thereon being in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPFEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner and Cecil Turner, Richard T. Fearnow, Infants, Plaintiffs.

VS.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW, and the PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Motion for a New Trial.

Come now the said defendants, Luttie B. Jones and Elmer Jones and move the court to set aside its decision and judgment in the said cause, and grant them a new trial therein, on the grounds and for the reasons following: "1st. The decision and judgment is contrary to the evidence; 2nd. The decision and judgment is contrary to the law; 3rd. The decision and judgment is contrary to the law and the evidence; 4th. The decision and judgment is not sustained by sufficient evidence; 5th. The decision and judgment should have been for these defendants and against the plaintiffs; 6th. The court erred in admitting incompetent, irrelevant and immaterial evidence offered on the part of the plaintiffs and over the objections and exceptions of these defendants; 7th. The court erred in excluding competent, relevant and material evidence offered on the trial of said cause on the part of these defendants; 8th. Error of law occurring on the trial and excepted to by these defendants."

J. F. KING,

*Attorney for Defendants, Luttie
B. Jones and Elmer Jones.*

Endorsed: No. 3900. Emily F. Fearnow et al., vs. Luttie B. Jones et al. Motion for new trial by defendants, Luttie B. and Elmer Jones. Filed in the District Court Sept. 2, 1913. Fred C. Groshong, Clerk of the District Court.

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner and Cecil Turner, Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW, and the PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Motion for a New Trial.

Comes now the said defendant, the Phoenix Mutual Life Insurance Company and moves the court to set aside its decision and judgment in the said cause, and grant it a new trial therein, on the grounds and for the reasons following: 1st: The decision and judgment is contrary to the evidence; 2nd: The decision and judgment is contrary to the law; 3rd: The decision and judgment is contrary to the law and the evidence; 4th: The decision and judgment is not sustained by sufficient evidence; 5th: The decision and judgment should have been for these defendants and against the plaintiffs; 6th: The court erred in admitting incompetent, irrelevant and immaterial evidence offered on part of the plaintiffs and over the objections and exceptions of these defendants; 7th: The court erred in excluding competent, relevant,

and material evidence offered on the trial of said cause on the part of these defendants; 8th: Error of law occurring on the trial and excepted to by these defendants.

J. F. KING,
*Attorney for Defendant, The Phoenix
Mutual Life Insurance Company.*

Endorsed: No. 3900. Emily F. Fearnow et al. vs. Luttie B. Jones et al. Motion for new trial by deft., Phoenix Mutual Life Insurance Co. Filed in the District Court Sept. 2, 1913. Fred C. Groshong, Clerk of the District Court.

Be it further remembered that thereafter on September 15, 1913, the same being a regular judicial day of the September, 1913 term of the said court, the said motion for a new trial of Luttie B. Jones and Elmer Jones came regularly on to be heard on the regular call of the docket; the said plaintiffs appeared by L. A. Maris, their attorney, and the said defendants, Luttie B. Jones and Elmer Jones appeared by J. F. King, their attorney, and after the reading and presentation of said motion for a new trial to the court, the court overruled and denied the said motion; to which the said defendants, Luttie B. Jones and Elmer Jones then and there at the time separately excepts.

78 Be it further remembered that thereafter on September 15, 1913, the same being a regular judicial day of the September, 1913 term of said court, the said motion for a new trial of the defendant. The Phoenix Mutual Life Insurance Company, came regularly on to be heard on the regular call of the docket, the said plaintiffs appeared by L. A. Maris, their attorney, and the said defendant, The Phoenix Mutual Life Insurance Company, appeared by J. F. King, its attorney, and after the reading and presentation of the said motion, to the court, the court overruled and denied the said motion; to which the said defendant, the Phoenix Mutual Life Insurance Company then and there at the time excepts; and thereupon on said 15th day of September, 1913, the said defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company move the court for and are by the court given ninety days in which to make and serve a case-made in said cause for the Supreme Court. The plaintiffs are given twenty days in which to suggest amendments thereto said case-made to be settled on five days' notice in writing. Case-made with petition in error and praecipe for summons to be filed in the Supreme Court in one hundred and twenty days. The journal entry of the overruling of said motions for a new trial, exceptions, and extension of time being in words and figures as follows:

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and the PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Journal Entry.

Now on this 15th day of September, A. D., 1913, the same being one of the regular judicial days of the September term, 1913 of said court, the motion for a new trial heretofore filed in said cause by the said defendants, Luttie B. Jones and Elmer Jones, came on regularly to be heard on the regular call of the docket. The said
79 plaintiffs appeared by their attorney, L. A. Maris, and the said defendants Luttie B. Jones and Elmer Jones appeared by their attorney, J. F. King, and thereupon the said motion for a new trial was read and presented to the court; and after the argument of counsel, and the court being fully satisfied in the premises, the court finds that said motion should be overruled.

It is therefore by the court considered and ordered that the motion for a new trial of Luttie B. Jones and Elmer Jones in said cause be, and the same is hereby overruled; to which the said Luttie B. Jones and Elmer Jones each at the time separately except. Thereupon the motion for a new trial heretofore filed in said cause by the said defendant, The Phoenix Mutual Life Insurance Company, came regularly on to be heard on said 15th day of September, 1913. The said plaintiffs appeared by L. A. Maris, their attorney, and the said Phoenix Mutual Life Insurance Company appeared by J. F. King and Hackney and Lafferty, its attorneys. After the reading of said motion for a new trial to the court and the presentation of the same, the court finds that said motion for a new trial of the Phoenix Mutual Life Insurance Company should be overruled.

It is therefore by the court considered and ordered that said motion for a new trial herein by the Phoenix Mutual Life Insurance Company be, and the same is hereby overruled; to which the said defendant, The Phoenix Mutual Life Insurance Company at the time excepted.

Thereupon the said defendants, Luttie B. Jones, Elmer Jones, and the Phoenix Mutual Life Insurance Company pray an appeal herein to the Supreme Court, and for an extension of the time in which to make and serve a case-made herein for the Supreme Court, and for good cause shown, it is by the court considered, and ordered that the said defendants, Luttie B. Jones, Elmer Jones, and the Phoenix Mutual Life Insurance Company, are given ninety days in which to make and serve a case-made herein for the Supreme Court. The said plaintiffs are given twenty days in which to suggest amendments

thereto, said case-made to be settled on five days' notice in writing.

Case-made, with petition in error and præcipe for summons
80 to be filed in the Supreme Court in 120 days with deposit for costs. Execution is stayed thirty days, within which time the execution of the judgment and decree herein may be stayed pending the determination of said cause in the Supreme Court as to said Luttie B. Jones and Elmer Jones, by depositing with the clerk of the court a good and sufficient deed conveying to plaintiffs all the right, title, and interest in the lands involved herein, which was held by the said Luttie B. Jones and Elmer Jones at the commencement of this action; said deed to be delivered to the said plaintiffs upon and in the event of the affirmance of the judgment and decree herein by the Supreme Court.

Execution as to said defendant, Phoenix Mutual Life Insurance Company of the judgment and decree herein is stayed thirty days within which time the execution of the judgment and decree herein may be further stayed until the final determination of said cause by the Supreme Court by the said Phoenix Mutual Life Insurance Company depositing with the clerk of this court a release of its mortgage mentioned in the judgment and decree herein, or by executing to the plaintiffs herein a good and sufficient bond in the sum of \$6000.00 with P. H. Albright as principal and C. A. Johnson and Grant Stafford as sureties; that the said Phoenix Mutual Life Insurance Company will abide the judgment herein if the same shall be affirmed by the Supreme Court.

W. M. BOWLES, *Judge.*

O. K.

L. A. MARIS,
Attorney for Plaintiffs.

O. K.

HACKNEY & LAFFERTY,
Attorneys for Phoenix Mutual Life Insurance Co.

J. F. KING,
Attorney for Luttie B. Jones and Elmer Jones.

Endorsed: No. 3900. Fearnow vs. Jones. Jr. Entry, Sept. 15, 1913. Filed Oct. 28, 1913. Fred C. Groshong, Clerk.

The foregoing contains a full, true and correct copy and statement of all the pleadings, motions, orders, evidence, findings, judgment and proceedings in the said action from the beginning of
81 the same to and including the overruling of the motions for a new trial and the granting of time in which to make and serve a case-made for the Supreme Court, as shown.

J. F. KING,
*Att'y for Def'ts, Luttie B. and Elmer Jones,
and the Phoenix Mutual Life Ins. Co.*

In the District Court of Kay County, Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW, and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

Service on me of the above and foregoing case-made in said cause is admitted this 18th day of November, A. D., 1913.

L. A. MARIS,
Attorney for Plaintiffs.

I, R. C. Fearnow, one of the defendants in the above case, hereby acknowledge service on me of the above and foregoing case-made this 15th day of November, 1913.

R. C. FEARNOW.

In the District Court of Kay County, Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW, and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

82 The said plaintiffs and L. A. Maris, their attorney of record, and the said defendant, R. C. Fearnow will please take notice that the said defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company, will, on Saturday January 3rd A. D., 1914, at eight o'clock A. M., or as soon thereafter as counsel can be heard present to the judge of said court at his Chambers in the city of Perry, Noble county, Oklahoma, the case made in said cause heretofore served on you and the amendments thereto suggested for signing, settlement and allowance by him.

J. F. KING,
Attorney for said Defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company.

I, the undersigned attorney for plaintiffs in the above cause hereby acknowledge service of, and the receipt of, a copy of the above notice this 27th day of December, A. D., 1913.

L. A. MARIS,
Attorney for Plaintiffs.

I, the undersigned R. C. Fearnow, one of the defendants in the above cause hereby acknowledge service of, and the receipt of a copy of the above notice this 27th day of December, A. D., 1913.

R. C. FEARNOW, *Defendant.*

In the District Court of Kay County, State of Oklahoma.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, Plaintiffs,

vs.

LUTTIE B. JONES, ELMER JONES, R. C. FEARNOW and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants.

I, the undersigned, judge of the district court, of the 12th judicial District of the State of Oklahoma, for Kay county Oklahoma, the district judge who tried the above entitled action, hereby certify that the foregoing was presented to me as a case-made in the action above entitled, at my chambers in the city of Perry, Noble county, 83 Oklahoma, this 3rd day of January, A. D., 1914. That the plaintiffs appeared by L. A. Maris, their attorney, and the defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company, a corporation, appeared by their attorney, J. F. King. That the defendant R. C. Fearnow, although he was duly served with written notice that the above and foregoing case-made would be presented to me at this time and place for settlement, signing and allowance, appears not, either in person or by attorney; that certain amendments suggested by the plaintiffs were by me allowed and incorporated into said case-made. That said case-made and amendments were served in due time, and within the time fixed by the order of the court extending the time to make and serve said case-made. That said case-made and amendments thereto are now submitted to me for allowance, settlement and signing as required by law, and in accordance with the orders made in the premises, by the parties to this action. That the said case-made as above set forth, and as corrected by me, is a true and correct case-made and contains a true and correct statement of all the pleadings, motions, orders, all the evidence, findings, journal entries, judgment, motions for new trial, and all the proceedings had in said cause, and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at chambers in the city of Perry, Noble county, Oklahoma this 3rd day of January, A. D., 1914.

[SEAL.]

W. M. BOWLES,
District Judge.

Attest:

FRED C. GROSHONG,

Clerk of the District Court of Kay County, Oklahoma.

Filed in the District Court Jan. 3, 1914. Fred C. Groshong, Clerk of the District Court.

84

9th Subdivision.

The defendants in error in No. 5978, except said Insurance Company, filed therein a motion to dismiss said case No. 5978, because among other reasons, it, the said case-made, did not contain a recital therein that said case-made contained all of the evidence used in the trial court, and that said motion was overruled by this court as appears in the record and in the decision thereon in — Oklahoma, Report, —, 149 Pac. 1138.

85

10th Subdivision.

Supreme Court, January Term, 1915, January 12, 1915, 1st Judicial Day.

5978.

LUTTIE B. JONES et al.

vs.

EMILY F. FEARNOW et al.

And now on this day comes Hon. J. F. King, attorney of record for plaintiffs in error, Hon. L. A. Maris, attorney of record for defendants in error being present and in open court presents motion of plaintiffs in error to revive the above action, as per said motion, and said motion to revive is submitted, and by the court granted, and the above action is accordingly hereby revived in accordance with said motion to revive. Mrs. Emma F. Doepel was appointed next friend for the infants, and L. A. Maris was appointed as guardian ad litem by the court.

Supreme Court, July Term, 1915, August 3rd, 1915, Ninth Judicial Day.

5978.

LUTTIE B. JONES et al.

vs.

EMILY F. FEARNOW et al.

And now on this day it is ordered by the court that the motion to revive the above action in the name of the administrator of the estate of Ethel T. Turner, one of the defendants in error, whose death has been suggested and in her heirs, be, and the same is hereby granted, and it is ordered by the court that as to said defendant in error said above cause be revived in the name of C. A. Johnson, administrator of the estate of Ethel T. Turner, deceased, and the heirs of said deceased.

86

11th Subdivision.

Supreme Court, October Term, 1915, October 12th, 1915, First Judicial Day.

And now on this day the following numbered and entitled causes are submitted upon the records and briefs filed herein:

5978.

LUTTIE B. JONES et al.
vs.
EMILY F. FEARNOW et al.

Supreme Court, October Term, 1915, October 12th, 1915, First Judicial Day.

5978.

LUTTIE B. JONES et al.
vs.
EMILY F. FEARNOW et al.

And now on this day it is ordered by the court that defendants in error herein be allowed twenty days in which to file brief.

Supreme Court Proceedings.

5978.

LUTTIE B. JONES et al.
vs.
EMILY F. FEARNOW et al.

And now, on this Nov. 10, 1915, it is ordered by the Court that plaintiffs in error herein be granted ten days in which to file reply brief.

Supreme Court, January Term, 1916, February 8th, 1916, Thirteenth Judicial Day.

5978.

LUTTIE B. JONES et al.
vs.
EMILY F. FEARNOW et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same, finds that the judg-

ment of the trial court in the above cause should be reversed and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded, with directions to set aside the decree in toto and to enter a judgment in favor of the defendant Luttie B. Jones. Opinion by Kane, C. J. All the Justices Concur.

87

Feb. 8th, 1916.

(Filed Feb. 8, 1916. William M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,
vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants, the Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

1. The United States Land Department primarily is entrusted with the disposal of the public domain, and the action of its officers will not be inquired into in the courts, unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they, themselves, were chargeable with fraudulent practices, and that as a result thereof the patent was issued to the wrong party.

2. F. Filed a homestead entry upon a tract of unoccupied public land and died before making his final proof. Thereafter J., a qualified homestead entryman, in her own right, presented to the proper officers of the land department a relinquishment of said entry and an application to enter said land, which were accepted, and her homestead entry placed of record. Thereafter the heirs of F. filed a contest against the homestead entry of J., wherein they alleged that her homestead entry was void, on account of certain alleged false statements of said entryman to the effect that she was the wife of F., the original entryman, which contest was rejected, the officers of the local land office and the Commissioner of the General Land Office holding that no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department could not question the validity of the marriage, the Secretary of the Interior further holding: (1) That this is a question the department cannot decide from the record before it; (2) that independent of this, the contestants presented no ground upon which their contest can be sustained; and (3) that their delay in proceeding to contest, pursuant to Section 2291, Rev. Stat. U. S. (Comp.

1901, p. 1390) is a sufficient reason for rejecting their contest. Thereafter J. submitted her final proof before the land department, whereupon a patent to said land in due form was issued to her by the United States. Thereafter in a suit in equity commenced by the heirs of F. against J. for the purpose of declaring a resulting trust upon the ground, "That the Department of the Interior committed error in said decisions and all of them in refusing to permit these plaintiffs (the heirs of F.) to show that said Luttie B. Jones, then Fearnow (J.), the defendant herein, was not the wife of the said

Hollen H. Fearnow (F.), deceased," the foregoing facts were
 88 agreed upon by the parties; Held: (1) That inasmuch as J. did not assert any right to the land as the widow of F., or procure the issuance of the patent pursuant to section 2291, Rev. Stat. U. S., the decisions of the officers of the land department in declining to pass upon the validity of the marriage of F. and J., were not erroneous; (2) That the claim of the heirs resting upon their relationship with E., they are not entitled to the relief prayed for, because they did not pursue their remedy before the land department, pursuant to section 2291, Rev. Stat. U. S.; (3) That, granting the heirs can make their final proof and present the affidavits, etc., required by section 2291 before the court, then the agreement of the parties as to the speculative nature of the homestead entry of F. should also be considered, and in that event, they would be no better off; (4) that the heirs of F. are not entitled to the relief prayed for upon any theory which may be properly predicated upon the record and agreed statement of facts before us.

(Syllabus by the Court.)

Error from the District Court of Kay County.

Hon. Wm. M. Bowles, Judge.

Reversed and Remanded With Directions.

J. F. King, for plaintiff in Error and cross-petitioner, The Phoenix Mutual Life Insurance Company; W. P. Hackney and J. T. Lafferty, (both of Winfield, Kas.) Of counsel for cross-petitioner.

L. A. Maris, for Defendants in Error other than The Phoenix Mutual Life Insurance Company; William H. England, Of Counsel.

Opinion of the Court by KANE, C. J.:

This was a suit in equity, commenced by all of the defendants in error, plaintiffs below, except the Phoenix Mutual Life Insurance Company, a corporation against the plaintiffs in error, defendants below, for the purpose of declaring a resulting trust. The defendant in error, the Phoenix Mutual Life Insurance Company, was the holder of a mortgage on the land involved, executed by the plaintiff in error, Luttie B. Jones, and was joined with her as a party defendant in the trial court.

89 This is the third time the causes has been before this Court, one phase of it having been considered in Fearnow v.

Jones, 34 Okla. 694, upon a former appeal, and another, upon a motion to dismiss the present proceeding in error, (Luttie B. Jones et al. v. Emily F. Fearnow, et al., not yet officially reported, 149 Pac. 1138.) After the cause was remanded to the trial court upon the former appeal, it was tried upon certain documentary testimony and an agreed statement of facts, after the consideration of which the trial court entered a decree in favor of the plaintiffs as prayed for, and further held that the mortgage held by the Phoenix Mutual Life Insurance Company "does not constitute any lien or incumbrance upon said premises and that said mortgage be cancelled, set aside and held for naught."

For the purpose of reviewing this latter decree of the trial court the defendants in error, Luttie B. Jones and Elmer Jones, commenced this proceeding in error, joining therein as defendants in error, the Phoenix Mutual Life Insurance Company, who filed a cross petition in error for the purpose of reviewing the part of the decree which affects its interests.

In our opinion, the decree rendered by the trial court is erroneous in its entirety. The tract of land involved was originally entered under the homestead laws of the United States by Hollen H. Fearnow on the 29th day of March, 1899, who immediately upon the filing of said entry, went into possession thereof and cultivated and improved the same as his homestead until the date of his death, which occurred on the 6th day of October, 1905; that for a considerable portion of the time he thus resided upon the land, he and the defendant, Luttie B. Jones lived together as husband and wife.

From an examination of the opinion formerly handed down it will appear that the decision of the court turned on the question, whether the land department erred in declining to inquire into the validity of the marriage of the entryman Fearnow, and the defendant, Luttie B. Jones, in a certain contest proceeding instituted against her by his heirs. The question arose upon a demurrer to the petition, which was sustained by the trial court, and overruled on appeal.

90 As we view the case as it is now more fully presented upon the record and agreed statement of facts, the question of whether the original entryman and the defendant Luttie B. Jones, née Fearnow, were legally married is in no manner material to a determination of this case. The agreed statement of facts, insofar as it is necessary to advert to it, shows that after the death of the entryman, Hollen H. Fearnow, the defendant continued to reside and make her home upon the land as she had formerly done; that on the 28th day of November, 1906, she presented to the proper officers of the land office at Guthrie, Oklahoma a relinquishment of the land and an application to enter the same as a homestead in her own name, which relinquishment and application were accepted and her homestead entry No. 14423 entered of record. That at said time she was an unmarried female over the age of twenty-one years, a native-born citizen of the United States, and in every respect entitled to make a homestead entry upon public lands under the homestead laws of the United States. That after making said home-

stead entry she continued to reside upon and cultivate and improve said land and in due time paid the purchase price and finally "proved up" the same under the homestead laws of the United States, whereupon a patent was — to her, wherein the foregoing facts and her compliance with the homestead laws are fully recited. That on the 12th day of December, 1906, prior to the issuance of the patent, the plaintiffs herein filed their contest affidavit against said entry of said Luttie B. Jones, then Luttie B. Fearnow; that on the 5th day of January, 1907, the United States land office at Guthrie rejected said contest affidavit as insufficient and rendered a decision in favor of the contestee. That said contestants appealed from said decision to the Commissioner of the General Land Office and the said Commissioner, on May 13, 1907, affirmed the said decision of the Land Office; that thereafter the said contestant appealed from the decision of the Land Office to the Secretary of the Interior and on the 1st day of September, 1907, the Secretary of the Interior affirmed the decision of the Land Office. Thus matters rested until patent was issued to the defendant Luttie B. Jones, when, some considerable time after the issuance of patent, this suit was commenced to declare a resulting trust.

91 In view of the conclusion we have reached, it will not be necessary to state in detail the facts in connection with the mortgage held by the defendant, the Phoenix Mutual Life Insurance Company, or notice their contentions in relation thereto, as there appears to be no controversy between it and the defendant Luttie B. Jones. If in the consideration of the case before us, we start with a correct premise we think there will be no difficulty in demonstrating the correctness of the conclusion hereinbefore indicated. It is well settled that the United States Land Department primarily is entrusted with the disposal of the public domain, and that the action of its officers will not be inquired into in the courts, unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they, themselves, were chargeable with fraudulent practices, and that as a result thereof the patent was issued to the wrong party. *Ross v. Stewart*, 25 Okla. 611; *Fast v. Walcott*, 38 Okla. 715. This principle is recognized as correct by all the parties to this controversy, the plaintiffs contending that they are entitled to relief on account of material errors of law committed by the officers of the land department in a contest proceeding between the heirs and the defendant, and as a result thereof the patent to the land involved herein was issued to the defendant, whereas, it should have been issued to the plaintiffs as heirs of the original entryman, Hollen H. Fearnow. It becomes necessary, therefore, to inquire what error of law, if any, did the officers of the land department commit? In the contest affidavit filed before the land office the contestants alleged that the homestead entry of Luttie B. Fearnow was null and void, for the reason that her pretended marriage with Hollen H. Fearnow was invalid. The register and receiver of the local land office and the Commissioner of the General Land Office held in effect that no adjudication of the nullity of the marriage

having been made by any court of competent jurisdiction, the department would not question the validity of the marriage upon the protest filed. This is the specific error of law which the plaintiffs allege the officers of the land department committed.

92 The Secretary of the Interior, however, rejected the contest upon two additional grounds, the correctness of which were not questioned by the heirs in their petition, but which will be noticed by us later in connection with another phase of the case.

As the facts were stated in the petition and admitted by the demurrer filed thereto, this Court formerly held that the land department erred in declining to inquire into the validity of the marriage of the original entryman and Luttie B. Fearnow. An examination of the opinion then rendered will disclose that this conclusion was based upon the assumption that the defendant procured the issuance of her patent under section 2291, Rev. Stat. U. S. However, upon the fuller statement of facts contained in the record and in the agreed statement of facts now before us, we are convinced that the decision of the Secretary of the Interior rejecting the contest of the plaintiffs was correct in every particular. As the case now stands, it is conceded that Luttie B. Fearnow, at the time she made her homestead entry, was a qualified homestead entryman, and that she presented her relinquishment and application to file upon this land as such entryman, and that her application was accepted and filed of record as one entitled to make such entry in her own right. It is proper to say at this point that whilst the record and agreed statement of facts now before us is sufficiently full and clear to disclose the immateriality of the marital relations of Hollen H. and Luttie Fearnow, it is quite deficient when it attempts to disclose the exact facts immediately surrounding the acceptance by the land department of the relinquishment and the application to make homestead entry presented by Luttie B. Fearnow. Neither the relinquishment nor the application to enter said land presented by Luttie B. Fearnow are contained in the record before us, and, although plaintiffs allege in their petition "that at the time of the filing of said relinquishment and the said homestead entry * * * she claimed to be the widow of Hollen H. Fearnow, deceased," the allegation is not covered by any evidence in the record or admission in the agreed statement

93 of facts. It is clear, therefore, that even now we are not favored by all the facts which the officers of the land department had before them and, no doubt, considered in allowing the defendant to file upon the land. In the absence of proof to the contrary, it will be fair to assume that the relinquishment and the application presented by Luttie Fearnow were in the usual form, and contained no false statements as to her marital relations with the former entryman. At any rate, no such statement was material to any right she was then seeking to assert, and if she made any such statements to the land officers at that time, there is nothing in the record to indicate that they were misled by them, or that they in any way influenced their action accepting the relinquishment and application to make a homestead entry in her own name. Con-

ceding, then, as the court has held, that in a proper case, the land department would be required to inquire into the validity of the marriage of parties similarly situated, it is quite apparent to us that in the case before us, no such inquiry was necessary, for the simple and sufficient reason that Luttie Fearnow claimed, and acquired, no right by virtue of any relationship with the former homestead entryman, Hollen H. Fearnow, but, on the contrary, her right to the land was based entirely upon a homestead entry made by herself as a qualified entryman under the homestead laws. As it is shown by the contest affidavit filed before the land department, the decisions of the various officers thereof, and the former opinion of this Court, that the only vice ever urged against the homestead entry of Luttie B. Fearnow was, that at the time she made the same she wrongfully claimed to be the wife of Hollen H. Fearnow, we might rest here, but, inasmuch as the heirs have succeeded in successfully maintaining what seems to us a wholly untenable position, we deem it advisable to notice a few other phases of the case.

94 One of the other features of the case worthy of notice is that in addition to the findings of the officers of the local land office and the Commissioner of the General Land Office to the effect that the validity of the marriage of the defendant Luttie B. Fearnow was not a proper subject for consideration in the contest proceedings, the Secretary of the Interior, in his decision, based his conclusion upon two additional grounds. Speaking of the legal status of the contestants he says:

"Contestants have presented no grounds upon which the contest can be sustained. They do not allege a priority of right to make entry, or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow, and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow, it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right, it would be necessary to re-instate that entry and to show that it was improperly cancelled, not by reason of any technical objection in the procedure, but upon its merits. Furthermore, their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry."

This seems to us to be a correct statement of the law. Section 2291 of the Revised Statutes (U. S. Comp. Stat. 1901 p. 1390), providing for the disposition of a homestead entryman's rights upon his death, is as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proved by two credible witnesses that, he, she or they have resided upon or cultivated the same for a term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as pro-

vided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

Now, it is entirely clear that neither of the parties to this controversy attempted to avail themselves of the remedy provided by the foregoing section of the Revised Statutes. As we have already seen, the defendant Luttie B. Fearnow, instead of claiming any right in the land by virtue of being the widow of the original entryman, made application for the land in her own right, entered

95 the same and proved it up, paying the purchase price, not as the widow of the *the* original entryman, but as a qualified homestead entryman. On the other hand, the heirs resting their claim upon their relationship to the original entryman were bound to proceed in accordance with the foregoing statute, but instead of doing so, they filed a contest against the homestead entry of the defendant, wherein they seek to cancel the homestead entry of Luttie B. Fearnow upon the sole ground that at the time she made said homestead entry, she claimed to be the wife of Hollen H. Fearnow, deceased. In view of the facts that she was claiming no right to the land by reason of any relationship existing between herself and the original entryman, we are unable to see the materiality of such a claim or how it would affect the result of this suit, even if it were conceded she made it. If Luttie B. Fearnow had rested her claim upon her relationship to Hollen H. Fearnow, the original entryman, she would have been required to proceed in accordance with section 2291, *supra*, of the Revised Statute; but instead of doing this, as she had a perfect right to do, she elected to file a homestead entry of her own and prove up the land in her own name. The heirs, instead of pursuing their remedy under section 2291, *supra*, attempted to follow procedure for which there is no warrant in the law, so far as we are informed. By further reference to this section it will be seen that the proof required by section 2291 must be made within two years after the entryman or his heirs have earned the land by residence, improvement, etc. In such circumstances we fully agree with the conclusion reached by the Secretary of the Interior that in the contest case the "contestants have presented no grounds upon which their contest can be sustained," and that "their delay in not presenting their claim (in the manner provided by section 2291), even if valid, is a sufficient reason for rejecting their claim to contest this entry."

If we examine the case from still another viewpoint, the same conclusion must be reached. One of the defenses set up in the answer of the defendant herein was that Hollen H. Fearnow, the original entryman, did not enter the land in controversy in good faith, but for speculative purposes. Responsive to the issue 96 thus raised, the agreed statement of facts states in effect that about three or four days prior to filing his homestead entry, Hollen H. Fearnow, the entryman, entered into a verbal contract with his mother, Emily F. Fearnow, by the terms of which Hollen

H. Fearnow for a valuable consideration agreed to enter said tract of land as a homestead in his own name, prove up, under the homestead laws, and after procuring a patent to the land, make a conveyance of the same to his mother. To avoid consideration of these facts counsel for plaintiff say in their brief:

"All questions of fact must in their inception be raised in the land department and if they have not been raised there, the courts are without jurisdiction to consider them. The land department is invested with sole authority at law to determine questions of fact. The court was without jurisdiction to hear or in any way consider such matters except the party has presented them or offered to present them to the land department. The United States Constitution and statutes are conclusive upon this question.

'The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States'. United States Const. Art. IV, section 3, Cl. 2.

Under the authority of this section congress has conferred jurisdiction upon the commissioner of the general land office, under the direction of the Secretary of the Interior, to supervise the disposition of the public lands."

In considering this phase of the case, let us assume that this is a correct statement of the law and follow the premise of counsel to its inevitable conclusion. It is conceded that the heirs base their right to the land upon their relationship with the original entryman, Hollen H. Fearnow. Keeping this concession in mind, let us now inquire what it was necessary for them to do in order to acquire title from the United States? To this we must again revert to section 2291 of the Revised Statutes of the United States. We find that before patent could be issued to the heirs, it was incumbent upon them to prove by two credible witnesses that either the entryman or they have resided upon or cultivated the land for a term of five years immediately succeeding the entry, and make affidavit that no part of such land has been alienated, except as provided in section 2289, and that they will bear true allegiance to the government of the United States. Then, in such case, the statute further provides,

97 if at that time they are citizens of the United States, they shall be entitled to a patent as in other cases provided by law.

It must be conceded, of course, that all the proof, affidavits, etc., required by the statute must be presented before the proper officers of the land department before any one claiming thereunder would be entitled to a patent. It is obvious, then, that the heirs, not having submitted their final proof before the land department, it will be necessary for them to do so before the court, before they would be entitled to have a resulting trust decreed in their favor, and that this cannot be done if, as their counsel contend, "All questions of fact must in their inception be raised in the land department, if they have not been raised there, the courts are without jurisdiction to consider them." It does not seem to us to be necessary to pursue this line of inquiry much farther. If this premise of

counsel for the plaintiffs is conceded, it but leads them up to an insuperable barrier against recovery. On the other hand, if we assume that counsel were in error in their premise, and that final proof on behalf of the heirs may be made before the court, it would seem to follow that the agreed facts in relation to the good faith of the original entryman ought also to be admissible, and in that event the heirs would be placed in no better situation.

It seems to be well settled that the rights of those claiming public lands must be determined by the validity of the original entry. 32 Cyc. 806; *Watts v. Amos*, 14 Okla. 178; *Galliher v. Caldwell*, 18 Pac. 68.

Indeed, the homestead entry of Hollen H. Fearnow had formerly been cancelled by the land department upon the identical facts agreed upon by the parties herein in a contest proceeding instituted against him by one Lena Barnes, who was permitted to file upon the land in her own name. Her entry, however, was suspended by the Commissioner of the General Land Office for some defect in the notice of contest and she dismissed her contest case at the time the defendant herein filed the relinquishment and made entry. This ground of contest was well known to the defendant herein, and she would have been entitled to avail herself of it as against the heirs if they had attempted to make final proof before the land department as required by section 2291, *supra*. Admittedly she was a qualified homestead entryman subsequent to the death of the original entryman, whether she was legally married to him or not, and she, or any other qualified homestead entryman, or, indeed, anyone knowing the facts could, in behalf of the government, interpose this barrier as against anyone resting their right to the land upon the speculative entry of Hollen H. Fearnow. If the equitable remedy the heirs are now invoking was available to them, and the foregoing contention of their counsel was correct, it would be a shrewd move on their part if not quite honest, to avoid submitting their final proof before the land department, pursuant to section 2291, *supra*, which procedure obviously would be beset by many perils and difficulties, and wait until the defendant had entered the land, earned it by residence, improvements, payment of purchase price, etc., made final proof and secured her patent, and then make final proof before the court, where all such troublesome pitfalls would be avoided.

As, in our judgment, the heirs would not be entitled to the relief prayed for upon any theory which may be properly predicated upon the record and the agreed statement of facts, the judgment of the court below is reversed and the cause remanded with directions to set aside the decree in toto, and enter a judgment in favor of the defendant, Luttie B. Jones.

All the Justices concur.

99 In the Supreme Court of the State of Oklahoma.

(Filed Feb. 23, 1916. William M. Franklin, Clerk.)

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,

vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Ralph McGrew, Violet McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, and The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Petition for a Rehearing.

Come now the defendants in error, other than the Phoenix Mutual Life Insurance Company, and respectfully represent to the court that on the 8th day of February, 1916, a decree and judgment was rendered by it in said cause erroneously reversing the judgment of the district court of Kay county, remanding said cause to said court and instructing and directing said court to render judgment in said cause in favor of the plaintiff in error, Luttie B. Jones, and against defendants in error, who hereby apply for a rehearing herein, for that said decision overlooked vital questions and decisions decisive of the case, as follows to-wit:

I.

The court overlooked the portion of the former opinion in this case reported as the case of Emily F. Fearnow et al. vs. Luttie B. Jones at al., in 34 Okla. 694, wherein this court, speaking through Judge Ames, then Supreme Court Commissioner, held that Luttie B. Fearnow never was the wife of Hollen H. Fearnow, the original Homestead Entryman of the land in controversy in this action, and in that connection this court overlooked the law, that not being the wife of the Homestead Entryman, she had no right to make a release of the homestead entry of said Hollen H. Fearnow. And hence, overlooked the point and law that the said release upon the facts as to the successors to said Hollen H. Fearnow did not embrace the said Luttie B. Fearnow and that she had no right to release said Homestead

Entry of said Hollen H. Fearnow, and had no right to make
100 a homestead entry upon said premises in her own name to the prejudice of the rights of the real successors of said Hollen H. Fearnow, under Sections 2291 and 2292 of the Revised Statutes of the United States, and overlooked the fact that the said heirs of the said Hollen H. Fearnow were the real beneficiaries of the real donee right under said sections of the Rev. Stat. of the United States to consummate an entry of said land, not under the laws of Descent

and Distribution of the State of Oklahoma, but under the provisions of the said sections of the Rev. Stat. of the United States.

And, so overlooking the above matters in their proper relationship, each to the other, this court has overlooked a question decisive of the case, viz: that the U. S. General Land Office and the Department of the Interior erred as a matter of law in not ordering a hearing and upon the undisputed facts relative to the said Luttie B. Jones being or not being the wife of Hollen H. Fearnow and the law relative thereto deciding that she was not the widow, and therefore, not entitled to either relinquish the homestead entry of Hollen H. Farnow or to make an entry of said land after such void relinquishment for her individual use and benefit under the said sections of the said Rev. Stat. of the U. S. as the entry of said Hollen H. Fearnow was made.

II.

It appears from page 6 of the opinion in this case that the court has overlooked the stipulation and agreed statement of facts set forth at page 35 of the record wherein it is specifically set forth as follows:

"That thereafter on the 28th day of November, 1906, the defendant, Luttie B. Jones, then Luttie B. Fearnow, filed a relinquishment of the Homestead Entry of Hollen H. Fearnow, and the same was filed by her, claiming to be the widow of the said Hollen H. Fearnow, and without the knowledge and consent of the plaintiffs in this action, or any of them, and without the knowledge and consent of the defendant, R. C. Fearnow."

In connection with this the court's conclusion on page 6 of opinion is as follows:

"It is quite deficient when it attempts to disclose the exact facts immediately surrounding the acceptance by the land department of the relinquishment and the application to make homestead entry presented by Luttie B. Fearnow. Neither the relinquishment nor the application to enter said land presented by Luttie B. Fearnow is before us."

And so overlooking said matters set forth at page 35 of the record this court was misled into its conclusion in said opinion as to the question of said purported widow's relinquishment and the legal effect thereof, and thereby, this court erred in its conclusion, by failing to conclude that the aforesaid relinquishment was void. And if the recitals of the said record as to the evidence in the trial court as shown by said stipulation were not sufficient, as concluded by this court, as above set forth, then it was the duty of this court, instead of predicating thereon a judgment of reversal of the lower court and remanding with directions to enter a judgment for plaintiff in error, to go no further than to grant a new trial and to remand the case to the lower court for a new trial because of error, if error it was, in the trial court, in rendering its judgment upon the stipulation and agreed statement of facts, as this court assumes, instead of upon said agreed statement of facts and the records and documents which

established such agreed facts, and which records and documents were not introduced in evidence in the trial court because of said stipulation of facts in said case as appears by said written stipulation; and, has overlooked the fact that at the conclusion of said stipulation it was provided:

"That all the facts admitted by the pleadings in said action to be true shall be considered by the court as facts in said action, and that all of the above mentioned facts shall be considered in connection with the pleadings in this case."

That at the beginning of said stipulation it was provided:

"That the following are facts and may be read in evidence in the trial of said case * * *." (Rec. p. 33.)

And that therefore, there was no provision that said stipulation was a complete and exclusive record of the facts in said matter. The court was at liberty to and did hear other evidence. That the case was not tried entirely upon an agreed statement of facts was decided by the court in this case reported in 149 Pac. 1138. We therefore,

respectfully submit that the limit to which this court should
102 have gone would be to hold that the judgment was not supported by sufficient evidence and send the case back for a

new trial. And even this last proposition we dispute because we contend that the record is sufficient to show that plaintiff in error in the lower court in writing agreed that "the exact facts immediately surrounding the acceptance by the land department of the relinquishment" was that "the same (relinquishment) was filed by her claiming to be the widow of the said Hollen H. Fearnow.

III.

The opinion in this case shows that the court has overlooked the "Jekyll-Hyde" character of the proceedings by Luttie B. Fearnow on November 28th, 1906 at the U. S. Land Office at Guthrie, Oklahoma, in this, to-wit: It has overlooked the facts and the law set forth in the first and second grounds of this petition for rehearing, which now by reference are made a part of this third ground; and in connection therewith overlooked the fact that Luttie B. Fearnow, "claiming to be the widow" aforesaid, which claim was without right and against the law, assumed to control the right to relinquish the homestead entry of Hollen H. Fearnow as his widow, and overlooked the law as theretofore decided by the court that she was not his widow, (Fearnow vs. Jones, supra); and overlooked the fact and the law that said U. S. Land Office and the Department of the Interior had by mistake of law prevented a hearing upon the application of two of the heirs of said Hollen H. Fearnow which would have established that she was not the widow, and in connection therewith overlooked the fact and law that said Luttie B. Jones had illegally relinquished the homestead entry of Hollen H. Fearnow when she was not his widow and on the same day, Nov. 28, 1906, made her application to enter said land as her own homestead entry, not as the widow, but as a mere qualified entryman under the general provisions of the homestead laws of the United States, thus using said void relinquishment for the fraudulent purpose of depriving the

heirs of said Hollen H. Fearnow of their rights coming to them, not through the laws of descent and distribution of Oklahoma, but through the donee provisions of said Act of Congress above referred to as Secs. 2291-2 of the Rev. Stat. of the U. S.; and, has overlooked the further facts set forth in the pleadings and exhibits thereof and in said stipulation that before the said Luttie B. Fearnow made final proof under her homestead entry of Nov. 28, 1906, that on December 12, 1906, as shown by Exhibit A (rec. pp. 8-9-10) of the petition and said stipulation (Rec. p. 33 et seq.) in said cause that the said two heirs for the rest of the heirs of said Hollen H. Fearnow duly presented said U. S. Land Office and the said Land Department of the United States the fact that Luttie B. Fearnow had "filed a purported relinquishment of the said Homestead Entry of the said Hollen H. Fearnow * * * and that said relinquishment was null, void and of no effect as against the heirs of the said Hollen H. Fearnow, deceased. That at the same time and place the said Luttie B. Fearnow filed her Homestead Entry No. 14423 on the land above described; that the said Homestead Entry is null and void because of the rights of the heirs of the said Hollen H. Fearnow; that the said rights could not be relinquished by the said Luttie B. Fearnow, and her attempted entry made in her own right should be cancelled." (Rec. pp. 8-10). And not only the U. S. Land Office and the said Department of the Interior overlooked that the said contest affidavit charging said relinquishment as being void was filed within fourteen days after said Luttie B. Fearnow filed said purported relinquishment and made her homestead entry, but this honorable court has overlooked said fact in its opinion herein, wherein it is intimated, that the heirs of Hollen H. Fearnow did not promptly present their claim, the language of the Secretary of the Interior, "their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry" be endorsed by the opinion as a proper statement of the law applicable to the facts in this case. And the court has overlooked the fact that the heirs could not make an entry until the illegal entry accorded to Luttie B. Fearnow had been cancelled and that said contest method was the only way provided by the rules of practice of the U. S. Land Office and Department of the Interior of ridding the records of an entry fraudulently or illegally allowed by hearing upon such affidavit of contest and if the charges contained in the affidavit of contest were true, to have cancelled her entry and then for the heirs aforesaid, within a time fixed by the land office or Department of the Interior to consummate and perfect an entry upon the land in favor of the heirs of an original entryman, when there was no widow, under the preference right granted by Congress under said sections 2291-2 of the Rev. Stat. of the U. S. See McMichael vs. Murphey, 197 U. S. 304.

IV.

This Honorable Court in its opinion overlooked the fact that the matter therein referred to as the contest instituted against the entry

of one Hollen H. Fearnow by one Lena Barnes, in the lifetime of the said Hollen H. Fearnow, was a proceeding wherein the Assistant Commissioner of the General Land Office, as shown at pages 42-43 of the record herein, held that there was no jurisdiction acquired over Hollen H. Fearnow, and set aside all proceedings had therein and held his homestead entry intact, which holding was never appealed from and remained the final decision and judgment of the Interior Department upon said question, and that said Hollen H. Fearnow died October 23rd, 1905, and that contest of Lena Barnes was never revived against his heirs, but was dismissed by her after the death of said Hollen H. Fearnow without further proceedings being had thereon, and this court has thereby overlooked that each and every of the proceedings in said Barnes' contest was immaterial to the issues in the case, because said homestead entry of Hollen H. Fearnow was intact of record, uncancelled and no charge pending against it, except the contest of Lena Barnes which was subsequently dismissed without the same having been revived against his heirs.

V.

As a part of this fifth ground these defendants in error by reference incorporate the foregoing fourth ground and further say that this Honorable Court in its opinion at page 11 thereof refers to the fact that Lena Barnes dismissed her contest case aforesaid at the time that Luttie B. Fearnow filed the purported relinquishment and made her homestead entry, and then this court says:

105 "This ground of contest was well known to the defendant herein (meaning Luttie B. Fearnow) and she would have been entitled to avail herself of it as against the heirs if they had attempted to make final proof before the land department as required by Sec. 2291, *supra*."

And in the above and foregoing connection this court has overlooked the fact that said contest had not been revived against the heirs of Hollen H. Fearnow, as well as overlooked the fact that Luttie B. Fearnow, then claiming to be the widow, was in possession of said land antagonistic to said contest and that the heirs were not parties to said contest and not bound by any proceedings therein. And this court further overlooked the law that such a defense as was outlined and set forth was not available as against the heirs aforesaid who took and acquired their rights to consummate a homestead entry not by the laws of Oklahoma regulating Descent and Distribution of estates, but by Secs. 2291-2 of the Rev. Stat. of the U. S., and that such right came to the heirs free from taint or defect which might have been urged against the ancestor in his lifetime and in the connection overlooked, as did counsel in the case, including ourselves, the following decisions decisive of said question, as follows, to-wit:

In *re White*, 1 L. D. 55, wherein it was held:

"Notwithstanding that the homestead entry in this case was illegal at its inception on account of alienage of claimant, his widow (who was not an alien) is allowed to purchase under the act of June 5th, 1880."

In *Dorame Heirs vs. Towers*, 1 Copps. Publ. Land Laws, Vol. 1 (1882) page 438 et seq. after citing Secs. 2290-91-97, secretary Chandler said:

"It is evident from these provisions that the making of the first affidavit is a personal act, binding and responsibility of the applicant, alone, and for which no other person can be held accountable or criminally liable if perjury be committed. The death of the party casts whatever of title or estate the statute has created, directly by operation of law, upon first, the widow; Second, the heirs or devisees; and, the substitution being effected, the requirement being effected, the requirement of proof of residence or cultivation attaches to the person or persons succeeding to the right, title or estate."

Third syllabus, page 438:

"The provisions of Sec. 2291, Revised Statutes, are substantially complied with by continued cultivation by the heirs, personal residence not being required in their case."

In *re Heirs of Stephenson vs. Cunningham*, 32 L. D. 653-4: 106
 "Upon the death of the entryman the right to the entry was cast upon the widow; it came to her as a valid, live subsisting entry, free from any taint or defect on account of the entryman."

In *Howe v. Parker*, 190 Fed. 755, it is said:

"But in the case at bar the attempt is to extend the disqualification to a new class of persons (Henry Howe's heirs) and acts not specified in the statutes and to punish with disqualification an entryman who falls clearly within the qualified classes described in the statute because he is alleged to have violated prohibitions which the acts of congress do not contain. Because any extension of the disqualifications prescribed by these acts to classes not here clearly specified has the like effect as the extension of a penal law to persons and acts not within its terms. The prohibitions and disqualifications of these statutes should be interpreted by the familiar rule that, where the statute is before the event, plain and unambiguous, the courts may not lawfully extend it to a class of persons who are excluded by its terms, nor by interpretation or construction after their commission make acts violations thereof which were not clearly such by the express will of the legislative department when they were done." (Citing a host of cases.)

And further, at page 757 in the same case, the Court of Appeals said:

"Henry Howe died June 17, 1893, and his right to his homestead was then granted to his heirs by Sec. 2291, U. S. Rev. Statutes."

This court has overlooked this question decisive of this case which has also been overlooked by counsel herein in this court by reason of the fact that the lower court decided in favor of the heirs and for the first time there has been brought up specifically in this case by the opinion of the court therein the importance of the acts of Luttie B. Fearnow in regard to the purported relinquishment so far as it affected the rights of the heirs of Hollen H. Fearnow and the method she adopted to clear said record entry, so she could make a homestead entry thereof in her own name, that is to say, this court has

overlooked that said Luttie B. Fearnow was bound to know and knew that she was not the wife of said Hollen H. Fearnow at the time she made said purported relinquishment and that without giving the heirs of said Hollen H. Fearnow any notice of her intention to relinquish said entry as his widow, she filed said purported relinquishment well knowing at the time that under the facts and the law applicable thereto it was void, and that she then immediately thereafter entered said land in her own name thereby segregating said tract of land from the public domain, to which proceeding and each and
 107 every part thereof the said heirs were not parties, nor had they any notice thereof, nor had the land office and the Department of the Interior jurisdiction over them at that time, and they were not bound by said relinquishment nor by any purported rights claimed by the said Luttie B. Fearnow thereunder by reason of no jurisdiction of their person and the further reason that jurisdiction of the subject matter in the making of the said relinquishment by the said Luttie B. Fearnow was obtained in said U. S. Land Office by the said Luttie B. Fearnow's misrepresenting that she was the widow of Hollen H. Fearnow and thereby committing a fraud upon said Land Office and causing it to cancel said entry, thereby depriving the heirs of their day in court on the matter acted upon then and there by the said land office.

VII.

That the court in its decision herein has overlooked the fact and the law as disclosed by the record herein that the officers of the U. S. Land Department committed a material error of law, by which as a result thereof the patent to the land in controversy was issued to the wrong party, to-wit: Luttie B. Fearnow, whereas, it should have been issued to the heirs of Hollen H. Fearnow, deceased, because of said facts, to-wit: It was made to appear to the U. S. Land Office as well as to the Land Department at Washington, D. C. by the contest affidavit of the said heirs setting up among other things the facts which showed that said relinquishment was void, that said Hollen H. Fearnow left no widow; that he left the said heirs which under sections 2291-92 Rev. Stat. U. S., were granted the absolute right to commute an entry in the name of the heirs of the said Hollen H. Fearnow, deceased, without any taint or defect from the original entry, which might have been urged against Hollen H. Fearnow, in his lifetime; and that by the motion of the said Luttie B. Jones and her proceedings to dismiss the contest brought by two of the heirs of Hollen H. Fearnow, as a matter of law, she admitted the truth of the allegations of said contest affidavit against her but that the said land office and land department erred as a matter of law as decided by this Honorable Court in its former opinion herein (34
 108 Okla. 694) in not sustaining the sufficiency of the allegations of the said contest affidavit and in not ordering a hearing thereon; and that said heirs were entitled to a hearing thereon; and this court has overlooked the further fact in connection with the foregoing that said heirs were erroneously denied a hearing

by the said land office and Department of the Interior and that they did not have said hearing until they brought their action in the Kay county District Court in this case.

VIII.

This Honorable Court has also overlooked the fact apparent on the face of the record that the Secretary of the Interior committed a material error of law in not ordering a hearing on the affidavit of contest to determine whether or not Luttie B. Fearnow was or was not the widow of said Hollen H. Fearnow, deceased.

IX.

This Honorable Court further overlooked the fact that the Secretary of the Interior committed a material error of law to determine whether or not the said Luttie B. Fearnow had practiced a misrepresentation and fraud upon the U. S. Land Office and the Department of the Interior in the matter of the purported relinquishment in the matter of the charges preferred against the same, prior to the final proof of Luttie B. Fearnow, as preferred by two of the heirs of Hollen H. Fearnow by said affidavit of contest and that by the failure of the U. S. Land Office, the Commissioner of the General Land Office and the Secretary of the Interior to order such hearing and by the subsequent proceedings by the said Land Department, Commissioner of the General Land Office and Secretary of the Interior in said matters and as a result thereof the patent was issued to the wrong party, to-wit: to Luttie B. Fearnow instead of its being issued to the rightful parties, to-wit: the heirs of Hollen H. Fearnow, deceased, as it would have been under the facts as would have then been made clearly to appear had not said heirs been prevented by said material error of law in dismissing said heirs' contest without a hearing, and thus depriving them of a vested right given them by sections 2291-92 Rev. Stat. of the U. S., without due process
109 of law in violation of the provisions of the Federal Constitution, guaranteeing due process of law and prohibiting any of the Government Departments of depriving any of the citizens of the United States of their property rights, and rights under the Constitution of the United States and the Amendments thereto as well as under the Acts of Congress of the United States, without due process of law.

X.

This court has also overlooked the fact that under the decision of this court in this case, 34 Okla. 694, it was held that the validity of the purported marriage of said Luttie B. Fearnow and Hollen H. Fearnow was a question properly before the Department of the Interior which the said Department could decide from the record before it, if said Department had conducted a hearing thereon.

XI.

This court has also overlooked the fact that in said prior opinion of this court that in substance it was held that said heirs' affidavit of contest did present grounds, sufficient, if proven, to set aside the purported relinquishment and the subsequent Homestead Entry made possible by the filing of the said purported relinquishment and that said contestants duly preserved their rights before the said Department of the Interior (3rd Syl.).

XII.

This Honorable Court also overlooked the fact and the records in the said foregoing matters that said former decision of this court (34 Okla. 694) in effect held that the heirs of Hollen H. Fearnow had not been guilty of delay or laches, they having waited only fourteen days after the filing of Luttie B. Jones before filing their contest against her said filing.

XIII.

This Honorable Court has also overlooked the fact that said Luttie B. Fearnow did assert as shown by the record, that she was the widow of Hollen H. Fearnow, which, if true, under the law, gave her the right under Sec. 2291, Rev. Stat. U. S., and thereby the first subdivision of that portion of the syllabus appearing on the
110 second page of the opinion is directly contrary to the record, for without the widow's right, she had no right under Section 2291 aforesaid, and that said patent could not ultimately have been obtained by her, if the original entry of Hollen H. Fearnow had not been cancelled by said void and fraudulent relinquishment filed by Luttie B. Fearnow, as aforesaid.

XIV.

The decision of this Honorable Court has overlooked the following question of law, to-wit: that the heirs of Hollen H. Fearnow, owing to the said fraudulent acts of the said Luttie B. Fearnow in the matter of her said relinquishment and her immediately entering said land in her own name, prevented the heirs from making their formal final proof pursuant to Sec. 2291, Rev. Stat. of U. S. until they had contested and caused to be vacated and set aside the prior relinquishment aforesaid and the subsequent homestead entry made by said Luttie B. Fearnow. See 173 U. S. 587, Duluth &c. Ry. Co. v. Roy.

XV.

This Honorable Court has also overlooked the law in reference to the effect of the so-called speculative nature of the original Homestead Entry of Hollen H. Fearnow and in considering the same as affecting in any way whatever the rights of the said heirs, in that

said holding by this court in the last part of the syllabus and in the opinion in support thereof is contrary to Secs. 2291-92 of the Rev. Stat. of U. S. and to the decisions of the United States Supreme Court construing said sections.

XVI.

This Honorable Court on page 11 of its opinion in citing 32 Cyc. 306, and *Watts v. Amos*, 14 Okla. 178 and *Gallagher vs. Caldwell* (Wash.) 18 Pac. 68, states a proposition that as applied by the cases covered by the said citations, as an abstract proposition will not be disputed, but by reference to the cases above referred to, it will be seen that the facts in those cases were not analagous to the facts in the case at bar on the question of the rights conferred on the heirs of a deceased entryman where the entry is made after the death of the original entryman. *Prosser vs. Finn*, 208 U. S. 67, cited in support of 32 Cyc. 608, was a case between the original entryman and where no question of Secs. 2291-92, Rev. Stat. was involved. Indeed in that case the court said:

"That the principle was well settled that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee for the true owner," citing many cases.

It would seem that the court has overlooked the cases cited by the U. S. Supreme Court in the case of *Prosser vs. Finn*, supra, because the case of *Bernier vs. Bernier*, 147 U. S. 242 is cited in support of our contention here. And the cases of *Watt vs. Amos*, supra, and *Gallagher vs. Caldwell*, supra, are cases in which the disqualification of the entryman was urged against him while he was alive and not against his heirs after his death, or, not analagous in other respects.

XV.

This Honorable Court has overlooked the fact and the law that the effect of the judgment it directs and enters herein against the heirs of *Hollen H. Fearnow* is in violation of Article 1, Sec. 10 of the Federal Constitution, which provides that "no state shall * * * pass any bill of attainder."

XVI.

This Honorable Court has overlooked the fact that the effect of this decision is to violate Secs. 2291-92, of the Rev. Stat. of U. S., and each of them in nullifying the rights cast thereunder in favor of the heirs of *Hollen H. Fearnow* to consummate an entry as stated by the Secretary of the Interior in *Heirs of Stevenson vs. Cunningham*, 32 L. D., where in a case between the widow and a protestant, it was held that "upon the death of the entryman the right to entry was cast upon his widow; it came to her as a valid, live subsisting entry, free from any taint or defect on account of the default of the entryman."

XVII.

This Honorable Court has overlooked the fact that heretofore in this proceeding, No. 5978, the defendants in error, plaintiffs
 112 in the trial court, urged in this court a motion to dismiss this proceeding in error for that "there was no recital in the case-made that it contains all of the evidence offered or introduced upon the trial of the said cause, and such being the case, the court cannot examine the evidence and consider any questions that would be determined upon such examination," and that this court overruled the motion to dismiss and held the case here, and this court has overlooked its uniform ruling in such cases, to-wit: that where it does not dismiss for and on account of such defect in the case-made, it will affirm the judgment of the trial court, if the decision must be based on a review of the evidence; and this Court in its opinion herein finds that there is not before it certain testimony in regard to the fact of the making of the purported relinquishment and the surrounding acts and circumstances which caused the land officials to permit Luttie B. Fearnow, as purported widow of Hollen H. Fearnow, deceased, and at the same time caused such officials upon such relinquishment thus illegally and fraudulently procured by Luttie B. Fearnow, when she knew she was not such widow and by virtue of her representation she was not such widow as found by the trial court, to then and there make an entry of said land merely as a qualified entryman and not as such widow as found by the trial court, although the undisputed and admitted facts show clearly she relinquished as widow; and the court has overlooked the fact that in the printed brief of defendants in error, upon the merits of the hearing after denial of motion to dismiss they renewed said objection to the case-made at the top of page 16 thereof, at pages 17 and 18 insisted that by reason of such defect and the controlling decision cited by them, which is likewise overlooked in the decision herein, viz., *McClellan vs. Minor*, 19 Okla. 104, 91 Pac. 863, it was the duty of this court to affirm the judgment of the trial court; and we respectfully submit that in view of the foregoing overlookings this court erred in its decision herein, after it found therein that all the testimony and evidence was not brought before it establishing the facts upon which the trial court rendered judgment in favor of the
 113 defendants in error and against the plaintiff in error, for this court, to thereupon fail to affirm said judgment and, to the contrary, erred in reversing the judgment of the trial court and in directing it to enter judgment for said Luttie B. Jones and against these defendants in error.

XVIII.

This court in its decision upon that portion of a review of the question of the disqualification acts of Hollen H. Fearnow, has overlooked the proposition that it is not inconsistent to say that a party might, upon opportunity, have offered proof of such disqualifying

acts, and yet by the original entryman could have no effect on the validity of the independent grant made to the heirs of Hollen H. Fearnow, deceased, by and in virtue of the act of Congress referred to herein as Secs. 2291-92 of the Rev. Stat. of the United States and has overlooked the fact that we have presented the question to this court in our printed brief at page 25, wherein we say:

"But we expressly raise the question by this brief and we raised it by our motion to strike such allegations from the answer in the trial court, and argument of the case there."

To which we may now add as the proceedings in the trial court resulted in a judgment for said heirs and against said Luttie B. Jones, that this Honorable Court by said overlookings was misled into, in its opinion herein, placing an erroneous construction on the legal effect of the original entryman's defects and defaults, if any, on the said grant of said sections 2291-92, and this court's erroneous construction was to the injury of the defendants in error and in conflict with the law on jurisdiction and the exercise thereof as settled in *Parker vs. Howe*, supra.

XIX.

This court has overlooked that portion of the record showing that at the time of Hollen H. Fearnow's death, the entry made by him was intact upon the records of the U. S. Land Office and that the Barnes' contest was never revived nor succeeded by said Barnes by any subsequent contest against the heirs, nor was any notice issued and served therein upon said heirs (see page- 31-33, 8-9-10 of 114 Rec.) and in connection therewith overlooked the law as declared in *Parker vs. Howe*, supra, that under such circumstances the contest and the proceedings had thereunder were of no effect whatever against the grant to the heirs under Sec. 2291 of Rev. Stat. U. S.

XX.

This court has overlooked the fact that the Entry of Hollen H. Fearnow, never having been legally relinquished by any party who had a right to relinquish it, remained and was in force upon said premises at the time of the pretended filing thereof of said Luttie B. Fearnow, and that therefore her filing was a mere nullity as decided by this court in the case of *McMichael vs. Murphy*, 12 Okla. 155, 70 Pac. 189; and has overlooked said controlling decision upon said point. See 32 Cyc. 808. And said filing of said Luttie B. Fearnow, being a nullity, all subsequent proceedings thereon are mere nullities and she could acquire no rights in said premises as against the rights of the said heirs of Hollen H. Fearnow therein.

XXI.

This Honorable Court has by its reversal of the judgment and decree of the trial court and directing a final judgment in this cause erred, and thereby this court as the highest court of the State of

Oklahoma upon the undisputed facts of the case shown by the record before it, instead of affirming the judgment of the trial court, directed an erroneous decree against these defendants in error, and so doing contrary to the provisions of Secs. 2291-92 of the U. S. Rev. Stat. and Art. 1, sec. 10 of the Federal Constitution and to a long line of decisions of the Land Department of the United States construing said sec. 2291, and to a long line of decisions of the Federal courts, including the Supreme Court of the U. S., construing said Sec. 2291 and the principles, practices and usages followed by the courts of equity of the United States in the matter of actions of charging a legal title under a patent from the United States and under decisions of the land Department of the United States upon which such patent was based, with a trust in favor of the rightful

owner of the equitable title to the land on account of an
 115 error of law or a gross mistake of fact, or a fraud upon the officers of the U. S. Land Office or of the Land Department by which the heirs were prevented from establishing their rights to the patent issued to another; and the decision of the court herein is contrary to the laws of the United States and a proper interpretation thereof, for that the ownership of the real estate in question rests upon the laws of the United States and correct interpretation thereof; and the decision of this court herein is contrary to the laws of the United States in deciding that a patent by the United States to a person, not the widow, or devisee or an heir of the deceased homestead entryman, whose at the time of his decease his entry was intact of record and final proof thereunder had not been made by him, was superior to the grant conferred by Congress under Sec. 2291 of the Rev. Stats. U. S. upon the heirs of such decedent, where there was no widow or devisee; and that too, in the instant case, where the patentee by misrepresentation that she was the widow, fraudulently induced the U. S. Land Office to permit her to relinquish the original entry aforesaid and concurrently therewith or immediately thereafter to enter under Sec. 2289, U. S. Rev. Stats., said land as a mere qualified entryman, upon which said heirs were erroneously denied the right to contest the cancellation of said original entry by said void relinquishment and concurrent entry by said patentee; and the decision of this court herein instead of affirming the trial court, it erroneously reversed it and directed it to enter judgment for plaintiff in error, thereby affirming the erroneous action of the officers of the said local land office in the matter of said relinquishment and consequent cancellation of original entry and immediate subsequent entry of the land by the party who fraudulently procured and induced said officers to permit said relinquishment and subsequent entry to be made and by such decision by this court herein, deprived and to deprive these defendants in error of their vested right and grant under said Sec. 2291, to said land, contrary to and in violation

of the provisions of the Federal Constitution and of article
 116 14 of the amendments thereto against depriving such parties of such grants, property and rights, without due process of law and against impairing the heirs' rights under said grant, in that said heirs were not parties to such relinquishment and cancellation

and had no notice or knowledge thereof until after made; as aforesaid, when they, within fourteen days thereafter, filed contest against same and against said concurrent entry made at the time said Luttie B. Fearnow made it as aforesaid, and which this court heretofore decided as the law of this case was sufficient to protect their rights in the premises.

XXII.

This Honorable Court has overlooked the undisputed fact upon the face of the record herein, that all acts necessary to consummate the title to the said land in the heirs under Sec. 2291 of the U. S. Rev. Stats. had been done except the formal making a final proof by the said heirs under the said Sec., and the court and all the counsel herein have overlooked an unbroken line of decisions by the United States Supreme Court, including the case of *Ard vs. Brandon*, 156 U. S. 537, and *Ard vs. Pratt*, 155 U. S. 537, reversing 43 Kan. 419, 425, which went to the U. S. Supreme Court from the Kansas Supreme Court, holding, in effect, as applicable herein, that where by the acts of the patentee or of the land officials, the heirs were prevented from making final proof, their omission in making final proof should not work to their prejudice, but in their favor in a suit in equity to declare a resulting trust. And this court has overlooked the familiar principle of law that where a tract of land is covered by a homestead entry intact of record, whether contested or not, no person except the entryman can make final proof or make another entry of the tract, unless and until such entry of record is legally relinquished or cleared in some way; hence, the heirs could not have made entry until the Barnes contest was formally dismissed: and it appearing that Luttie B. Fearnow's Entry, the said void and fraudulent relinquishment and the dismissal of the Barnes contest
 117 occurred simultaneously, in law there never was an opportunity for the heirs to attempt to avail themselves of their grant under said Sec. 2291, *supra*, until immediately after Luttie B. Fearnow fraudulently had acted as above, thereby preventing the heirs, and which was brought to the attention of the land officials within fourteen days after the first opportunity to assert their rights, and by the said officials denied their day in court thereon.

XXIII.

This Honorable Court has overlooked the fact that in the former decision in this case, 34 Okla. 694, this court settled the law of the case as to the sufficiency of the heirs' petition to declare a resulting trust and the sufficiency of the facts therein pleaded by overruling the demurrer to the petition, reversing the trial court and remanding the cause; and has overlooked the question of law therein at pages 699-700, decisive of one of the fundamental bases of this case, to-wit:

"The next proposition stated by counsel for the defendants (Luttie B. Jones and the Mtg. Co.) is that even though the marriage is void, its validity cannot be inquired into in this proceeding to declare a

trust. If this were true it would follow that the woman, notwithstanding the fact that she was not the lawful widow of Fearnow, could keep this land without the fact of her relation to him being inquired into by any tribunal. The land office has declined to make inquiry into the fact, and if the court likewise refuse, then the heirs who are in law entitled to the estate, would be deprived of it without having their day in court."

And thereby by such decision of the Land Department, which in effect, is the last decision of the court herein now complained of, deprives the said heirs of their day in court contrary to the provisions of the Federal Constitution and of Art. XIV of the Amendments thereto, prohibiting the deprivation of such right, in that they had no hearing upon, nor notice of, said void relinquishment being offered or proposed to be offered until after it was used illegally to cancel the deceased entryman's entry upon the record and were then denied a hearing on their contest prior to final proof by the pretended widow and were not permitted to establish the truth of their charges against the said relinquishment. And, in the instant case, this court, by

118 overlooking the above proposition and the facts admitted and established upon the trial in the lower court upon the second trial therein, has erroneously upon such facts misapplied the law and rendered a final judgment contrary to the law, said admitted facts showing the truth of the allegations of said charges against said relinquishment, viz: That Luttie B. Fearnow was not the widow, and hence, under the law she knowingly used said relinquishment to deprive said heirs of their right and property aforesaid. Which judgment depriving said heirs of their rights and property aforesaid, practically nullifying and making void that portion of Art. VI of the Federal Constitution, whereby "said constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or the laws of the state to the contrary notwithstanding." That is to say, the decision herein complained of deprives, as above stated, the rights and property of the above heirs, under said law of the United States, as aforesaid, to-wit: sec. 2291 of Rev. Stat. of the U. S.

Wherefore, these defendants in error pray that a rehearing of said cause may be had by your Honorable Court; that oral argument be allowed and leave to file additional brief; that upon such rehearing the decision of Feby. 8th be withdrawn, and the decree of the trial court be affirmed, and any other proper relief which to the court may seem legal and proper. (See motion appended hereto for oral argument, as part hereof.)

L. A. MARIS,
MILTON BROWN,

*Counsel for Defendants in error, other than
Phoenix Mutual Life Insurance Company.*

Service of the within and foregoing petition for a rehearing is acknowledged to have been made on plaintiffs in error and upon

cross-petitioner, the Phoenix Mutual Life Insurance Company, this 22nd day of February, 1916.

*Counsel for Plaintiffs in Error and for
Phoenix Mutual Life Insurance Co.*

Feb. 21, 1916. I hereby enter my appearance as of counsel for defendants in error, in connection with Hon. L. A. Maris. Milton Brown, 415-416-417 Am. Natl. Bank Bldg., Oklahoma City, Okla.

119 In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES et al., Plaintiffs in Error,
vs.
EMILY F. FEARNOW et al., Defendants in Error.

Request and Reasons for Oral Argument Upon Rehearing.

The defendants in error, other than the Phoenix Mutual Life Insurance Company, upon the rehearing hereof respectfully ask that oral argument be allowed and leave to file briefs prior thereto be granted for the following reasons and upon the following grounds, to-wit:

I.

The decree in the trial court was in favor of the defendants in error, and by the decision of this court of Feb. 8th, 1916, reversing that decree and directing a contra-wise decree, controlling questions of law which support the decree of the trial court were overlooked by counsel and court, as set forth in the foregoing grounds for such rehearing.

II.

That the trial court properly under the law, as shown by said overlooked decisions, decided against the proposition that the heirs' rights and grant under Sec. 2291 of the Rev. Stat. of the United States could be disadvantaged by any taint or defect against Hollen H. Fearnow.

III.

That this court failed to distinguish between the character of the entry Hollen H. Fearnow, if alive, would have made, and that of the direct grant by the Act of Congress to the heirs, not by descent and distribution, but by operation of said Revised Statutes of U. S., sec. 2291.

IV.

That this court and counsel overlooked the undisputed fact and the law applicable thereto, that it was by the fraudulent act of Luttie B. Fearnow that the heirs were prevented from literally complying, before patent, with the formal matters, referred to in Sec. 2291, Rev. Stats. of the U. S., and the law aforesaid laid down in Duluth & I. Range Co. R. Co. vs. Roy, 173 U. S. 587, that where such omission occurred by the party omitting, being prevented by
120 the acts of the patentee, or by some error of the land department or both, that such matters should be considered in favor of the party thus prevented rather than to the advantage of the party occasioning said omission.

V.

That this court and counsel failed to distinguish between the law governing a case wherein all the facts were before the Department of the Interior and a case where by error of law, superinduced by the patentee, all of the facts were not before the Department of the Interior, but by pleading and the testimony establishing such matters were prevented from being submitted to the Department by the patentee and the mistake of law of the Department.

VI.

This court has overlooked the fact as agreed to in the record of this case, and the fact that when Hollen H. Fearnow died his entry was intact, of record, and Luttie B. Fearnow, not being his widow, had no right to relinquish that entry, and that Sec. 2291 of the Rev. Stat. U. S. controlled that entry absolutely after Hollen H. Fearnow's death.

VII.

The court overlooked the fact that as an isolated proposition it was immaterial as to what Section of the U. S. Rev. Stats. Luttie B. Fearnow, who was not the widow, made entry, except to show her purpose to illegally clear the record so she might enter, and had overlooked that the vice begun in her fraudulent and illegal relinquishing as his widow, when she was not such widow, and thus permeated with illegality any entry she might make.

VIII.

There has been so much mysticism and confusion thrown into this case by counsel for plaintiff in error incorrectly stating the claims of the defendants in error and their right under Sec. 2291, supra, and the character thereof, and because of the illness of counsel for defendants in error from which he had not recovered at the time when by order of this court as to extension of time
121 to file briefs for his clients it became necessary for him to prepare such briefs, who, because of said illness, was not able
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to properly and fully brief said cause; said matter having been called to the attention of this court by motion for an extension of time to file briefs, in the interest of simple justice under the law it is necessary to a clear presentation of the case in its present position that the above request should be granted.

IX.

That in addition to the foregoing it seems to us that this court has overlooked the rule, known as "the law of the case" by in substance adopting a rule for its guidance in this case, No. 5978, different from what it prescribed for the trial court in the same matter to follow in the trial resulting in the decree appealed from, which former decision in 34 Okla. 694, the trial court followed.

Respectfully submitted,

L. A. MARIS,
MILTON BROWN,

*Attorney for Defendants in Error other than
Phoenix Mutual Life Insurance Company.*

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES et al., Plaintiffs in Error,

vs.

EMILY F. FEARNOW et al., Defendants in Error.

*Affidavit as to Service of Petition for Rehearing and Motion for Oral
Argument.*

STATE OF OKLAHOMA,
County of Kay, ss:

Lester A. Maris, of lawful age, being first duly sworn, upon his oath says: That he is one of the attorneys for the defendants in error, other than the Phoenix Mutual Life Insurance Company; that he has attempted to make service of the petition for a rehearing and of the motion for oral argument thereon, upon Honorable J. F. King, attorney for the plaintiffs in error and for the defendant in error, The Phoenix Mutual Life Insurance Company, at Newkirk, Oklahoma, but upon inquiry, affiant learns that said J. F. King is not in Newkirk, which is his home and where he maintains his office, but that he is at Sallisaw, Oklahoma, a town far distant from Newkirk and not easily accessible to affiant; that on this day affiant is mailing copies of said petition for rehearing and of said motion for argument thereon to said J. F. King at Sallisaw, Oklahoma.

LESTER A. MARIS.

Subscribed and sworn to before me this 22nd day of February, 1916.

[SEAL.]

J. L. SOULIGNY,
Notary Public for Kay County, Oklahoma.

Commission expires Sept. 2, 1918.

I certify that I have by registered letter, postage and registry fee paid, mailed to Hon. J. F. King, above attorney for plaintiffs in error, at Newkirk, Okla., a copy of the petition for rehearing and request for oral argument in above case.

MILTON BROWN,
Of Counsel for Defendants in Error.

[Endorsed:] No. 5978. Lut-tie B. Jones and Elmer Jones, plaintiffs in error vs. Emily F. Fearnow et al., Defendants in Error. Petition for rehearing, service, etc. L. A. Maris, Ponca City, Okl., Milton Brown, attorneys for defts. in error.

122½ In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES et al., Plaintiffs in Error,

vs.

EMILY F. FEARNOW et al., Defendants in Error.

I hereby acknowledge receipt of a copy of the petition for a rehearing in the above cause this 23rd day of February, 1916.

J. F. KING,
*Att'y for Pl'tfs in Error and the Phoenix Mutual
Life Ins. Co., Cross-Petitioner in Error.*

[Endorsed:] No. 5978. Luttie B. Jones et al. vs. Emily F. Fearnow et al. Acknowledgment of service of Petition for Rehearing. (Filed Feb. 25, 1916. William M. Franklin, Clerk.)

123 12th Subdivision.

Supreme Court, January Term, 1916, April 4th, 1916, Forty-Fourth Judicial Day.

5978.

LUTTIE B. JONES et al.

vs.

EMILY F. FEARNOW et al.

And now on this day it is ordered by the court that the petition for rehearing filed herein on February 23, 1916, be, and the same is hereby overruled.

In the Supreme Court of the State of Oklahoma.

No. —.

LUTTIE B. JONES et al., Plaintiffs in Error,
vs.
EMILY F. FEARNOW et al., Defendants in Error.

Order.

Now on this the 4th day of April, A. D., 1916, said above entitled cause came on for further disposition, and the Court hands down its final order denying and overruling the petition of the defendants in error for a rehearing in this cause in this Court; whereupon said defendants in error except thereto and also except to the decision sought to be reviewed by said petition for a rehearing, which several exceptions were severally allowed by the Court for the purpose of a review thereof in the United States Supreme Court.

Thereupon the issuance of the mandate herein to the trial Court is recalled and stayed until Monday, April 17th, 1916 inclusive, said defendants in error meanwhile to file the usual Five Hundred (\$500) Dollar appeal bond in such cases.

Approved.

M. J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

Endorsed: No. 5978. In the Supreme Court of the State of Oklahoma. Lut-tie B. Jones et al., vs. Emily F. Fearnow et al. Order. L. A. Maris and Milton Brown, Attys. for Defendants. (Filed Apr. 10, 1916. William M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,
vs.
EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPFEL, and Emily F. Fearnow as Next Friend for Toledo Chamberlain, Walter F. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Richard F. Fearnow, Infants, The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Petition for Appeal by Defendants in Error and for Writ of Error.

The above named defendants in error, conceiving themselves aggrieved by the decision, judgment and opinion of this court, filed in the above entitled cause on February 8, 1916, and by its decision,

order and judgment made and entered on the 4th day of April, 1916, overruling and denying said defendants in error's petition for rehearing in said cause, by which last decision said State Supreme Court being the highest State Court in the State of Oklahoma to and in which the above cause could be heard, then and there by its decision rendered and entered final judgment in said cause against these defendants in error in favor of said plaintiffs in error, that is to say, the trial court, being the District Court of Kay County, State of Oklahoma, Judge William M. Bowles presiding, had decided the cause mentioned in favor of said defendants in error and against the said plaintiffs in error, adjudging and decreeing a resulting trust in

126 favor of said defendants in error and against the said plaintiffs in error, Luttie B. Jones, whereby 160 acres of land in

Kay county, Oklahoma, was under the act of Congress, known as Section 2291, Revised Statutes of the United States, adjudged, declared and decreed to be the property of the said defendants in error, Emma F. Doepel, et al., and that said real estate was held in trust by said Luttie B. Jones, the patentee from the United States for the use and benefit of said Emma F. Doepel et al., and her co-plaintiffs in the trial court; the said Emily F. Fearnow, who was the mother of the original homestead entryman, and the mother and grand-mother, respectively, of the plaintiffs in the court below, as stated in the petition therein in the trial court, having died intestate, since the judgment and decree in said Kay county Court in her favor, and her portion equally descended to her co-plaintiffs in the court below; and, that the mortgage given by the said Luttie B. Jones and her then husband, Elmer Jones, on said real estate was not a valid lien on said lands, it having been executed before the issuance of the patent from the United States to the said Luttie B. Jones, whom the said trial court held was not the owner of said property, although she held the legal title under said patent; that by the decision of the said Supreme Court, aforesaid, the said State Supreme Court reversing, vacating and setting aside the judgment and decree of said trial court, and directing the said trial court to render and enter a contrawise judgment and decree in favor of the said Luttie B. Jones and her then husband aforesaid, and in favor of the said mortgage company, the Phoenix Mutual Life Insurance Company, as to the mortgage on said real estate; that the said defendants in error, (except the said Life Insurance Company) hereby appeal from the said decision of the said State Supreme Court in reversing and setting aside the decree of said trial court in their favor, and in directing and rendering and entering of a judgment against said Emma, F. Doepel and her co-plaintiffs in said trial court, adjudging and decreeing said real estate as belonging to said Luttie B.

127 Jones, and that the said Emma F. Doepel, et al., the heirs of the original entryman, had no interest therein; and, the said defendants in error, as above specified, except said Insurance Company, do hereby appeal from said decisions, judgments and orders, and each and every of them, to the Supreme Court of the United States of America, for the reasons specified in the assignments of error which are filed herewith as a part hereof and marked "Ex-

hibit A"; these defendants in said State Supreme Court under the showing above and aforesaid ask that the subsequent proceedings in said cause be prosecuted under the name and style of Emma F. Doepel, and Emma F. Doepel as next friend of said infant defendants, by L. A. Maris, their guardian ad litem, R. C. Fearnow, Adm'r of estate of Emily F. Fearnow, deceased, Percy Hill, and C. A. Johnson, Adm'r of Ethel Turner Hill and R. C. Fearnow, instead of Emily F. Fearnow, et al., the said Emily F. Fearnow being deceased; and, defendants in error pray that this appeal may be allowed, and for a writ of error herein; and that a transcript of the record, proceedings and papers upon which said opinion, decision, judgment and final orders by said Supreme Court of the State of Oklahoma were made, rendered and entered, together with a copy of said opinion, judgment and petition for rehearing, and order denying a rehearing, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.

Dated this 17th day of May, 1916.

L. A. MARIS,
MILTON BROWN,
*Attorneys for Emma F. Doepel et al.,
Defendants in Error.*

Writ of Error allowed this 18th day of May, 1916.

MATTHEW J. KANE,
Chief Justice Supreme Court of the State of Oklahoma.

Attest:

WM. M. FRANKLIN, *Clerk,*
[SEAL.] By G. C. STARK, *Deputy.*

Endorsed: No. 5978. In the Supreme Court of the State of Oklahoma. Luttie B. Jones et al. vs. Emily F. Fearnow, et al. Petition for Writ of Error on Appeal. (Filed May 18, 1916. William M. Franklin, Clerk.)

128

15th Subdivision.

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,
vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter F. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Richard F. Fearnow, Infants; The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Assignment of Errors.

The above named Emma F. Doepel, et al., defendants in error in the Supreme Court of the State of Oklahoma, as shown by the record and proceedings in said cause, except the said Insurance Company, now and here state the following assignments of errors, being those upon which they rely and will rely for a reversal of the judgment and decree of the Supreme Court of the State of Oklahoma in said cause against them, and for an affirmance of the decree and judgment rendered and entered by the district court of Kay county, Oklahoma, in their favor, adjudging and decreeing that under Section 2291 of the United States Revised Statutes, the said plaintiffs below and defendants in error in the said State Supreme Court, excepting said Insurance Company, were the equitable owners of the real estate involved in said cause, and that said real estate was held in trust by the said Luttie B. Jones for the use and benefit of the said Emma F. Doepel, and her co-plaintiffs in the court below, although said Luttie B. Jones obtained from the United States a patent for the legal title to said lands, and that said Luttie B. Jones and her then husband aforesaid, Elmer Jones, were in possession thereof under said patent, and, the said judgment of the trial court holding that the mortgage placed on said land by said Luttie B. Jones and her then husband, and held by said insurance company, was not a valid lien on or against said land, and that the said Emma F. Doepel and her co-plaintiffs in the trial court, were entitled to be let into the possession of said real estate, in fulfillment of said trust, and it is now and here specified that the said decision of the Supreme Court of the State of

Oklahoma, whereby it reversed the trial court aforesaid and
129 directed a contrawise judgment and decree as aforesaid, was
contrary to the law properly applied to the undisputed facts,
in violation of the Act of Congress known as Section 2291, Revised
Statutes of the United States, for in that, under the undisputed evidence the said Emma F. Doepel et al., heirs of the late Hollen H. Fearnow, original entryman, were the equitable owners of said real estate and entitled thereto as against the said patentee, Luttie B. Jones, and all persons claiming or attempting to claim under her, including the said owner of said mortgage given before the patent was issued, and that the decision of the Supreme Court of the State of Oklahoma, aforesaid reversing the judgment and decree of said trial court, adjudging and decreeing in favor of said heirs of Hollen H. Fearnow, deceased, was contrary to and in violation of the opinion and decision of the Supreme Court of the State of Oklahoma, construing said United States law as declared in the opinion written by the Honorable C. B. Ames and reported in 34 Okla. at page 694, which was the "law of the case" herein, and that by the said decision of February 8, 1916, and the decision denying a rehearing herein, said Supreme Court, notwithstanding it was estopped by the said 34th Okla. decision in said case, yet it, on the 4th day of April, 1916, erroneously denied a rehearing to these defendants in error being the heirs of Hollen H. Fearnow, deceased, who were thereby de-

prived of their right and property, to which they were entitled under Section 2291, Revised Statutes of the United States, such deprivation being by the Supreme Court of the State of Oklahoma, and then and thereby being contrary to the provisions of the Constitution of the United States on due process of law and guaranteeing to every citizen of the United States his or her day in court, and guaranteeing the security of the citizens in their rights and property. The said State Supreme Court, being the highest State court in said State in which said matter could be tried and determined finally in said state.

II.

As a second assignment of error, the said Emma F. Doepel, and her associate defendants in error in this court, as aforesaid, state that the Supreme Court of the State of Oklahoma made a
130 gr-evious and reversible mistake of law on the undisputed facts in the case, whereby said State Supreme Court, in the first subdivision of the second syllabus held as follows:

"Held, that inasmuch as 'J' did not assert any right to the land as to the widow of 'F' or procure the issuance of the patent pursuant to Section 2291, Revised Statutes of the United States, the decisions of the officers of the land department in declining to pass upon the validity of the marriage of F. and J. are not erroneous."

Whereas, the undisputed and admitted facts are that 'J' meaning Luttie B. Jones, did assert a right under Section 2291, U. S. Rev. Stats., namely in that she went to the United States Land Office at Guthrie, Oklahoma, and as the pretended widow of 'F', meaning Hollen H. Fearnow, the deceased entryman, relinquished the homestead entry of said Hollen H. Fearnow, deceased, as his widow, notwithstanding that she, the said Luttie B. Jones, under the undisputed and admitted facts and the said 34th Okla., decision applying the law of Kansas where the pretended marriage was made and had, and the law of Oklahoma where the pretended residence was made and had, was not the wife of Hollen H. Fearnow in his lifetime, nor after his death his widow, but was living an incestuous life with said Hollen H. Fearnow, contrary to the laws of Kansas and Oklahoma aforesaid, and the purported marriage was void under said admitted facts and law. Notwithstanding it was estopped under the law of the case as fixed by the decision in the 34 Okla., aforesaid, it misapplied the law applicable to said admitted facts, and ruled against the facts and the law in holding that Luttie B. Jones did not assert any right as the widow of Hollen H. Fearnow, and erred in overlooking the law that said Luttie B. Jones could not have procured a patent unless and until she had procured the relinquishment and cancellation of the right of the homestead entry of Hollen H. Fearnow in the manner and form, shown by the admitted facts, adopted by her in securing the relinquishment of said entry as the widow, notwithstanding she was not his widow, and then procuring the issuance of the patent to her not under Section 2291 as widow, but under the Section of the Revised

Statutes of the United States regulating patents to original entrymen, and that by its said decision, the said State Supreme Court erred in holding that upon the admitted facts the officers of the land department did not err in declining to pass upon the validity of the marriage of 'F' and 'J' aforesaid. The State Supreme Court being the highest State court in said State in which said case could be tried and determined finally in said State.

III.

And as a third assignment of error, the said State Supreme Court furthermore erred upon the admitted facts, and contrary to the estoppel, against it, in and by said decision in said cause in said 34th Oklahoma, in holding that:

"The claims of the heirs, resting upon their relation with 'F,' they are not entitled to the relief prayed for because they did not pursue their remedy before the Land Department, pursuant to Section 2291, Revised Statutes of the United States;" for that the claims of the heirs did not rest upon their relation with F., and did rest upon the donee provisions of said section 2291."

And for that the said State Supreme Court upon the undisputed facts misapplied the law as to the proceeding of the heirs of Hollen H. Fearnow, deceased, before the Land Department, and the legal effect thereof, and said State Supreme Court ignored the force and effect of the admitted facts, that by the act, misrepresentation and imposition of the said Luttie B., in relinquishing the entry of the original entryman, as his widow, when she was not, that the said heirs of the said Hollen H. Fearnow, deceased were delayed and prevented from making an entry under Section 2291, U. S. Revised Stats., until after the said Luttie B. had, by said trick procured an entry in her own favor, not as the widow or heir, but as a mere qualified entryman, and not then and not until after they had endeavored to contest the same, as set forth in said 34th Oklahoma Report, aforesaid when their contest was erroneously and contrary to law rejected, as decided in said 34th Oklahoma Report, and which decision had not been vacated, reversed or set aside at the time of the trial of this case on the merits thereof; and that under the undisputed facts the said heirs pursued the only remedy before the land department, provided by the rules of said land department and the federal laws then in force and effect as far as they were permitted by the officers thereof, in relation to clearing the records of the local land office of entries erroneously allowed and reinstatement of an entry unlawfully relinquished, before an entry could be made or consummated by the party entitled to make the same, after which latter entry had been reinstated a patent only could be effected in said land department by said heirs, and said State Supreme Court overlooked the law applicable to said undisputed facts, to-wit: that by the pretensions of said Luttie B., as aforesaid, and errors by the officials of the land department, occasioning said delay and preventing said patent to

issue to said heirs, said heirs were absolved from blame for being deprived of pursuing the formal remedy or procedure under said Section 2291, their adversary and the officers preventing said pursuit, and said Supreme Court should have, under the law and practice, and usages of courts of equity, held that by reason of the said pretensions, and prevention by said Luttie B., and concurrent therewith, the said mistakes and errors aforesaid of the local land office and the land department on the question of said Luttie B., being the widow, when she was not, and the illegal and erroneous "segregation" based thereon, the said heirs were entitled to equitable relief, as prayed for by them, and that the said decision of the State Supreme Court as embodied in the second clause of its holding in the second syllabus is contrary to the law upon the undisputed and admitted facts, and contrary to the letter and spirit of said Section 2291, Rev. Stats., of U. S., the said State Supreme Court being the highest State Court in said State in which said case could be tried and determined finally in said State.

IV.

And the said Emma F. Doepel and her co-plaintiffs below and co-defendants above, as hereinafter specified, as a further and fourth assignment of error say that the said State Supreme Court was correct in part in saying, in the third subdivision of its second syllabus: "The heirs can make their final proof and present their affidavits, etc., required by Section 2291, before the court, * * *," but the said State Supreme Court erred in further holding and saying in said third subdivision of said second syllabus: "* * * then the agreement of the parties as to the speculative nature of the homestead entry 'F' should also be considered, and in that event they would be no better off, * * *," and said State Supreme Court further erred in overlooking the fact that said "agreement referred to a stipulation referring to the departmental decision in the Barnes contest, as bearing upon the answers of the defendants, Luttie B., her husband and said Insurance Company, pleading the R. H. R.'s decision in the Barnes contest, and said "agreement" did not admit anything independently as a fact, as to said Hollen H. Fear-

133 now's entry being "speculative." And said State Supreme Court upon the undisputed facts in the record on the mooted "speculative" proposition, misapplied the law on the undisputed facts and record in the Land Department in said Lena Barnes case and erred in ruling against the brothers, sisters and nephews and nieces of the deceased entryman, for that the record, in the trial court, showed that the Barnes contest, which was only ple-d to show the delays in the department, contained a final adjudication in favor of Hollen H. Fearnow's entry on the charge of speculation, and to the contrary of said answers contained, a reversal by the department (by Commissioner Fimple of the land department*) at Washington, D. C., of Register and Receiver's cancellation based on the charge of speculation, such reversal being in the lifetime of said Hollen H. Fearnow, after he had disclosed a complete defense thereto be-

fore the Commissioner, and the record further showing that the said Hollen H. Fearnow died, and that the Barnes contest was never revived against his heirs, and was dismissed thus leaving the record, at the time of Hollen H. Fearnow's death, clear of said mooted charge of "speculation," as per the directions of the Commissioner of Land Department at Washington, based upon the denial of said Hollen H. Fearnow as to said "speculation" charge as preferred and that no jurisdiction was proved to dismiss said Barnes contest, and from thence on, said Hollen H. Fearnow's mouth was closed in death, and by the neglect of the local land officers in doing their duty, under the letter of the Commissioner Fimple, the erroneous entry made by said Barnes was permitted to remain upon the record until said local officers, at the instance and instigation, jointly of said Luttie B. Jones and of said Lena Barnes, who was not related to any of the parties, dismissed the contest of Lena Barnes against Hollen H. Fearnow, relinquished the erroneous homestead entry made in favor of Lena Barnes, pending her contest, and said officials, through the false pretense of said Luttie, illegally and without authority of law permitted the said Luttie B., as the widow, when she was not the widow, to relinquish the reinstated homestead entry of Hollen M. Fearnow, and to make her own individual homestead entry under the general provisions of the Homestead Laws of the United States, thus said issue of speculative nature of Hollen H.

Fearnow's homestead entry, so far as being finally determined
134 adversely to the entry in the land department, was disposed of in favor of the dead man, and those claiming under him by the said action of said Lena Barnes; the acts of said Register and Receiver and said Commissioner's letter by acting Com'r, Fimple, setting aside the cancellation, pleaded in defendants' answers herein and dismissing Lena Barnes' contest and reinstating said Hollen H. Fearnow's entry; and the said State Supreme Court aforesaid also overlooked the law and decisions presented to it in the said petition for rehearing, which, upon the undisputed facts in Commissioner Fimple's decision a part of the record herein, showed that the purported agreement between Hollen H. Fearnow and his mother in her lifetime was in the nature of an advancement of money by the mother to the son with which to buy off a relinquishment of a prior homestead entryman and with which to buy the necessary articles a farmer uses in improving and cultivating a farm while proving it up for a home under the homestead laws, the son to return the advancement out of the crops for a certain period of years, etc., which judgment of cancellation on such charge, as shown by the evidence from the Barnes case, was rebutted and set aside; as the son had returned the advancement out of some two years' crops, the son in the meantime residing upon the land and making it his home and improving it, up to the time of his death, and Commissioner Fimple ordered the cancellation aforesaid vacated and set aside; thus the State Supreme Court overlooked the fact that said contract, even if as proven by Lena Barnes in her exparte, insufficient contest, indefinite and void, could not be enforced against said Hollen H. Fearnow, and there being a repudiation of it, after

the advancements made to him, were repaid out of the crops; there was nothing illegal or against the spirit of the homestead laws, in what he had done in receiving said advancement and in repaying same out of the crops for a part of the homestead period; and, that under the laws applicable thereto, the parties having repudiated or nullified a purported contract, as to anything thereafter, showing there was nothing that Hollen H. Fearnow had agreed to do, but which he did, that such could not invalidate the rights of his heirs at law as the designated beneficiaries of Congress under Section 2291, U. S. Rev. Stats., and that the State Supreme Court had no right or authority under said act of Congress to create a class not
 135 specified therein, against which to inflict a penalty or exclusion of right, when no such penalty or exclusion of right was specified by act of Congress against the heirs of an original entryman under said Section 2291, U. S. Stats., and also erred in that the R. and R's. judgment of cancellation had been set aside by Commissioner Fimple, and thereby the only purported defense on "speculation" plead in the answer in the case at bar, said judgment of cancellation was defeated, and the decision of said State Supreme Court on "speculative" nature, etc., was without pleadings, facts or law in the record under the law to support, and was contrary to due process, and denied said heirs their day in court therein, in the case at bar; the said State Supreme Court being the highest State Court in said State in which said case could be finally tried and determined in said State.

V.

As a fifth and further assignment of error, the State Supreme Court in its opinion upon the undisputed facts, misapplied the law wherein the State Supreme Court at page 11 of its opinion held and said:

"(This ground of contest) was well known (to the defendants herein), and she should have been entitled to avail herself of it as against the heirs, if they had attempted to make final proof before the land department as shown by Section 2291, *supra*. * * *."

Such holding has no foundation of fact or in law, upon which to base same, the undisputed facts being contrary to such holding of law, in this to-wit: Luttie B. Fearnow relinquished said Hollen H. Fearnow's reinstated entry as his widow, when she was not, and then upon such cleared record, made an entry in her own right and not as his widow, thus presenting the inconsistent position of clearing the record by her own act as widow under Hollen's entry, and then making entry in her own name and right and not as a widow, when she was not, thus preventing the heirs at law from consummating an entry or making a final proof until after said void and fraudulent relinquishment made by her could be set aside, including setting aside her homestead entry thereon, and the setting aside of which the heirs were prevented only by the fraudulent acts aforesaid of the said Luttie B., and the said errors and mistakes of law by the local land office and the land department, and hence, there was no

ground in the record for the holding of the State Court above quoted;
 besides she was then claiming to be his widow, and that she
 136 was rightfully in possession as his widow, that his entry was
 not speculative, but valid, and that she, as widow, had the
 right to relinquish it.

Estoppel.

Luttie B. Fearnow could not, as the widow, relinquish the contest of Barnes, or cause it to be relinquished, or even, if it had been relinquished, relinquish the reinstated entry of Hollen H. Fearnow, when she was not his widow, and then say it was illegal, when she had not asserted and could not have asserted any such charge, and now say, "if the heirs attempted to make final proof," which they could not under the law, by reason of Luttie B. Jones' acts of prevention, that she, Luttie B. Jones could now say, as against the heirs of her purported husband, whose mouth was sealed in death, that "she would have been entitled to avail herself of the charge of her purported husband having committed a crime, as against his brothers, sisters, nephews and nieces," if they had attempted to prove up under section 2291 Rev. Stats. of U. S. from being effective and to appropriate unto the use of herself and her then husband that which Congress intended should go to the heirs, in the absence of a widow; the said State Supreme Court being the highest State Court in said State in which said matter and cause could be finally tried and determined within said State.

VI.

And, as a further and sixth assignment of error, the State Supreme Court of Oklahoma erred in holding that, "the decree of the district court of Kay county, Oklahoma, was erroneous in its entirety," and as a part of said holding, held that the question as to whether Luttie B. Jones, formerly known as Luttie B. Fearnow, and the original entryman, Hollen H. Fearnow, were legally married, was not in any manner material to the determination of the case, in this, to-wit: that the said State Supreme Court of the State of Oklahoma entirely misconceived the relation and importance of her relinquishment, as the purported widow to the original entry of Hollen H. Fearnow; the undisputed facts being that Luttie B. aforesaid, relinquished said entry herself as the widow of Hollen H. Fearnow, when, under the undisputed facts and the law of the case, she never had been his wife, but had been living an incestuous
 life with him, prohibited by the laws of Kansas where the
 137 purported marriage took place, and the laws of Oklahoma
 where they so resided and which laws also declared such
 marriages illegal and void, and hence she had no right or authority, under Section 2291, U. S. Rev. Stats., to relinquish said entry; and thus, the Oklahoma Supreme Court erred in utterly overlooking, ignoring, or misconstruing said section 2291, notwithstanding that under the federal law, there being no widow, and there being heirs,

no one but the heirs could have relinquished said original nor the reinstated homestead entry of Hollen H. Fearnow; the said State Supreme Court being the highest State Court in said State in which said matter and cause could be finally tried and determined within said State.

VII.

And, as a further assignment of error, the said Emma F. Doepel, and her associate heirs aforesaid, say: That it does appear by the record herein that "the State Supreme Court of Oklahoma on the undisputed facts erroneously found and held in favor of said Luttie B. Jones upon a mooted defense, to their admitted right and claim, which mooted defense the said Luttie B. Jones urged in her defense, to-wit: 'the Register and Receiver held that the said Hollen H. Fearnow was disqualified by reason of making a false purported affidavit of non-alienation prior to making his homestead entry, and hence cancelled said entry.'

Whereas, as said heirs contended and contend, such making of an affidavit of the character mentioned, even if true, which said heirs deny, as to the same being effective as a defense, if at all, was such only insofar as the United States was concerned, and is, only in favor of the United States, and, in addition thereto, said Luttie B. could not consistently claim the right to relinquish as the widow, and then assert the aforesaid pretended disqualification as against the heirs at law of said Hollen H. Fearnow, and, furthermore, the State Supreme Court of Oklahoma had no power or authority to extend against the heirs at law of Hollen H. Fearnow as the beneficiaries of the Act of Congress under Section 2291, U. S. Rev. Stats., a penalty or right of forfeiture which could have been exercised, if at all, only by the United States against Hollen H.

Fearnow, had he been guilty of filing a false affidavit as to
138 the nonalienation before or at the time he made his original homestead entry under another section of same act of Congress, and yet the State Supreme Court of Oklahoma erroneously and contrary to the Federal laws in the above respect, inflicted a purported disqualification of Hollen H. Fearnow against the said donee beneficiaries of said Act of Congress aforesaid in favor of said Luttie B. Jones, and illegally decreed a forfeiture of their rights and property under Sec. 2291 aforesaid; the said State Supreme Court being the highest state court in said state in which said matter and cause could be finally tried and determined within said State.

VIII.

The said State Supreme Court of Oklahoma furthermore erred against the said heirs at law of Hollen H. Fearnow in setting aside the decree of the trial court of Kay county, Oklahoma in their favor upon the purported ground as stated in its opinion, to-wit: "that the record brought up from the trial court of Kay county, Oklahoma, to said State Supreme Court contained the plaintiffs'

petition therein, wherein in said Supreme Court opinion it was alleged:

"* * * That at the time of the filing of said relinquishment of said homestead entry * * * she claimed to be the widow of Hollen H. Fearnow, deceased, the allegation is not covered by any evidence in the record or admission in the agreed statement of facts; it is clear therefore that even now we are not favored with all the facts which the officers of the land department had before them and no doubt considered before allowing the defendant to file upon the land, in the absence of proof to the contrary it will be fair to assume that the relinquishment and application presented by Luttie Fearnow was in the usual form and contained no false statement as to her marital relation with the former entryman. At any rate, no such statement was material to any right she was then seeking to assert, and if she made any such statement to the land office at that time, there is nothing in the record to indicate that they were misled by them, or that they in any way were influenced — their accepting the relinquishment and application to make a homestead entry in her own name, * * *"

Whereas, the aforesaid record in said cause, as shown by the abstract of the case-made and the case-made itself, contained and contains the following statement, to-wit:

"* * * that thereafter on the — day of October, 1905, the said Hollen H. Fearnow died without having proved up said land, or having obtained patent for the same, leaving no children, nor the descent of any child of his surviving him, and leaving this defendant, Luttie B. Jones, then Luttie B. Fearnow, his widow, the only heir surviving him, * * * (see pages 28 & 29 of brief and abstract of plaintiff in error in State Supreme Court; from her answer.)

And "* * * (from the stipulation of facts in the case-made at page 35) that thereafter on the 20th day of November, 1906, the defendant Luttie B. Jones, then Luttie B. Fearnow, filed a relinquishment of the homestead entry of Hollen H. Fearnow, and the
139 same was filed by her claiming to be the widow of said Hollen H. Fearnow, and without the knowledge and consent of the plaintiffs in this action or any of them, and without the knowledge and consent of defendant, R. C. Fearnow; that thereafter and on the same day, November 28, 1906, the said Luttie B. Jones, then Luttie B. Fearnow, filed her homestead entry No. 14423 on said land in the United States Land Office at Guthrie, Oklahoma,
* * *"

Thus, the said holding by the said State Supreme Court, quoted in this assignment of error, is contrary to the admitted facts set forth in said case-made as above and referred to in said abstract as above, and, as a part of this assignment of error it is here and now urged, as it has heretofore been herein, that it was material as to whether Luttie B. Fearnow was the wife and subsequent widow and entitled to relinquish Hollen H. Fearnow's homestead entry as a widow, for she not being his widow, she was not entitled to relinquish his homestead entry, and that if the State Supreme Court found the record

deficient in the trial court in that particular, it could only reverse the judgment and decree of the trial court and remand the cause for a new trial; and, on the other hand, as we contended and contend, the record being sufficient and clear on said facts, and by said admissions, it appearing that Luttie B. Jones made the relinquishment as the widow of Hollen H. Fearnow, under section 2291, U. S. Rev. Statutes, when she was never his wife or widow, and then made a homestead entry in her own name under section 2290, U. S. Rev. Stats., it was the duty of the State Supreme Court to affirm the judgment of the district court of Kay county, Oklahoma, in favor of said heirs, and the said State Supreme Court, holding otherwise and contrary to the foregoing, erred and its judgment is and was erroneous and contrary to the admitted facts and the law thereon, and to the act of Congress regulating the disposal of public domain and particularly section 2291, U. S. Revised Statutes; the said State Supreme Court being the highest State Court in said State in which said matter and cause could be tried and determined within said State.

IX.

The said State Supreme Court erred upon the undisputed facts in not holding that the reinstated entry of Hollen H. Fearnow was cancelled illegally and contrary to law by the local land office at Guthrie, Okla., at the instance and relinquishment of Luttie B. Fearnow, claiming to be the widow, when she was not, and then and
140 there said local land officers permitted said Luttie B. Fearnow, to enter the said land as her homestead entry, solely because she was a single unmarried woman, and otherwise qualified to enter the land; and so erred because said section 2291, U. S. Revised Statutes, she, the said Luttie B. Jones, alias Fearnow, had no right to relinquish said entry, no right to make an entry of said land under section 2291, U. S. Rev. Stats., and she not being a widow, no right under said section 2291, and, notwithstanding she was permitted to enter the same, yet under the holding of the Supreme Court of Oklahoma, in *McMichael v. Murphy*, 12 Okl. 155-169 pages, and in the decision of the United States Supreme Court thereon in *McMichael v. Murphy*, 197 U. S. 304; that although said entry was of record, and so made of record as aforesaid, it segregated the land from the public domain as long as it was thus of record, and it legally follows that the rights of the said heirs at law under said section 2291, U. S. Rev. Stats., were suspended by such "segregation" procured by the preventive acts of the said Luttie B., and the errors and mistakes of law of the local land office at Guthrie, Okla., and the Commissioners of the General Land Office, and of the Secretary of the Interior, in respect to said entry of said Luttie B. Fearnow, alias Luttie B. Jones, and the said heirs having been prevented thereby to prove their rights under said section 2291, U. S. Rev. Stats., they had the right to prove the same in equity in this their said cause and action then before the court, and as held by the said Supreme Court of Oklahoma in 34 Oklahoma Report and in the former trial before Hon. William M. Bowles in the district

court of Kay county, Oklahoma, resulting rightfully in said heirs' favor therein, and before the said State Supreme Court of Oklahoma therein pending erroneously resulting in its last and erroneous judgment of the State Supreme Court aforesaid now and here complained of, herein, in favor of the said Luttie B. Jones and her then husband, against the said donee beneficiaries of said Act of Congress, contrary to Section 2291, U. S. Rev. Stats., and the provisions of the Constitution of the United States of America against depriving its citizens of their day in court and from taking their property without due process of law the said State Supreme Court being the highest state court within said state wherein the said cause and matter could be tried and determined within said State.

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X.

As a further assignment of error, the Supreme Court of the State of Oklahoma erred in holding that "the heirs at law of Hollen H. Fearnow, deceased, did not follow and pursue their remedy under section 2291, but followed a procedure for which there was no warrant in law, in so far as the Supreme Court was informed," and therein said State Supreme Court so erred in this particular; that it ignored and overruled the petition for rehearing by the heirs at law, showing that said court had overlooked the law of the United States that where the heirs were prevented as in the case at bar, by the acts and frauds of the purported widow, and the mistakes and errors of law of the local U. S. land Office, the Commissioners of the General Land Office and the Secretary of the Interior, as appears by the face of the records in said offices and departments, and by the undisputed evidence herein, that during such periods of time of prevention by said contests and said illegal and unauthorized action in respect to the Hollen H. Fearnow entry and the subsequent void erroneous homestead entry of Lena Barnes, said heirs could not make an entry under section 2291 until the said Barnes entry was cancelled of record and during such period, said Lena Barnes proceeding and void entry segregated said land so that no one during said period of segregation could make another entry thereof; and the said State Supreme Court further overlooked the undisputed facts and the law thereon, that on the same day Lena Barnes dismissed her contest against Hollen H. Fearnow now relinquished her personal homestead entry on said land, that said Luttie B. Fearnow then, but subsequently Jones, claiming to be the widow of Hollen H. Fearnow, and as such, relinquished the reinstated homestead entry of Hollen H. Fearnow when she was not his widow then and there without authority of law on the real facts, which were concealed by said Luttie B. from the register and receiver, who theretofore illegally and through her fraud and false pretense aforesaid, permitted her to make said relinquishment as his widow, and then to make an individual homestead entry in her own right under sections 2289 & 2290, U. S. Rev. Stats., without notice to said heirs, and that during said last mentioned segregation, the heirs at law of Hollen

H. Fearnow, could not make their proof under section 2291, supra, as donee beneficiaries thereof, until the last mentioned illegal and fraudulent relinquishment and concurrent homestead entry of Luttie B. Jones, alias Fearnow, could be cancelled by their contest proceeding begun within 14 days after said Luttie B. Jones was erroneously permitted to relinquish Hollen H. Fearnow's entry and then to file her homestead entry Number 14423, and which contest was subsequently and regularly prosecuted as far as said heirs were permitted to do by said Register and Receiver; said Commissioner of the General Land Office and said Secretary of the Interior, and until after the said Luttie B. Jones, through her said illegal, fraudulent and unauthorized proceedings aforesaid obtained a patent to said land on March 15, 1909; and that the said heirs as donee beneficiaries aforesaid within 30 days thereafter, and before the execution of the mortgage in suit, sued the said Luttie B. Jones and her then husband Elmer Jones, they being on said land, and said insurance Company, and so sued in the district court of Kay county, Oklahoma, to declare a trust in their favor against said Luttie B., and her husband and to declare that the said patent to Luttie B. was erroneously allowed and issued by mistake of law, whereas, had said heirs not been prevented as aforesaid and under the admitted facts, a patent should have been issued to and for the use of the said heirs at law of Hollen H. Fearnow, deceased, under section 2291, United States Revised Statutes; and, notwithstanding the above errors on the part of the State Supreme Court, yet, under the undisputed facts aforesaid in respect to the acts and proceedings of the said heirs at law of Hollen H. Fearnow, deceased, and under the said acts and pretensions of said Luttie B. Fearnow, and admitted not to be the widow, and by the mistakes and errors of law of the said land department, the said heirs as donee beneficiaries aforesaid were erroneously prevented from receiving and having their day in court and from having and enjoying the rights vested in them by the Act of Congress known as Sec. 2291, United States Rev. Statutes, and thus the said State Supreme Court erred in holding in its said opinion on the above matters, as a matter of law, that the said heirs had lost their rights by "not having submitted their final proof before the land department * * * or it will be necessary for them to do so before the court, before they will be entitled to have a resulting trust decreed in their favor, and that this cannot be done as * * *"; and thus the said State Supreme Court erred as a matter of law in the above holding, in that it ignored and overlooked the law as declared by the United States Supreme Court and the law of the land that there can be no charge of laches preferred and sustained in favor of one holding the legal title or possession of land in the public domain, contrary to law as against a party, or parties who, under the Act of Congress, fairly administered, is entitled to not only the legal title but is the rightful owner, under the provisions of the Act of Congress regulating the disposal of public domain; and the said Supreme Court of Oklahoma, having ruled contrary to the above act of Congress and the decisions of the Supreme Court of the United States, in respect to said doctrine

of laches, the said decision of said State Supreme Court is erroneous and contrary to the law of the land, and is deprivable of said property and the rights of said heirs at law, as donee beneficiaries aforesaid, contrary to the provisions of the Federal Constitution against the taking of one's property and rights without due process of law; the said State Supreme Court being the highest State Court in said State wherein said cause and matter could be finally tried and determined within said State.

XI.

And as a further and eleventh assignment of error herein, the said Emma F. Doepel and her associate heirs at law herein, as aforesaid, say: that the decision of the State Supreme Court of Oklahoma, in reversing the judgment and decree of the district court of Kay County, Oklahoma in their favor and in directing a judgment and decree against said heirs and in favor of said Luttie B. Jones and her then husband, Elmer Jones, aforesaid, is erroneous and deprives the said heirs at law of Hollen H. Fearnow, deceased, as donee beneficiaries under said Act of Congress, Sec. 2291, U. S. Rev. Stats. of their rights and property aforesaid in and to said land under the said provisions of section 2291 United States Revised Statutes, upon the admitted facts in said case, and thereby making void and violating that portion of Article 6 of the Federal Constitution and that

part of Article 14 of the Amendments to said Constitution, 144 whereby said Constitution and the laws of the United States made pursuant thereto are, and shall be, the supreme law of the land, and judges in every state shall be bound thereby, anything in the Constitution or laws of the States to the contrary notwithstanding, and those provisions in said Constitution and the amendments thereto aforesaid prohibiting the deprivation of one's day in court, and prohibiting the taking of the rights and property of the above heirs under said section 2291 Revised Statutes of the United States, and prohibiting the taking of said rights and property of said heirs without due process of law; the said State Supreme Court being the highest state court within said state wherein said cause and matter could be tried and finally determined within said State.

XII.

The State Supreme Court of Oklahoma, the highest court in said State wherein said cause and matter could be finally determined within said State, erred against the above heirs at law of Hollen H. Fearnow, deceased, donee beneficiaries under said Act of Congress, in reversing the judgment and decree of the district court of Kay County, Oklahoma, decreeing that said heirs were the owners in fee simple of the premises described in plaintiff's petition, to-wit: the Southwest Quarter of Section Eleven, Township Twenty-six North of Range One East of the Indian Meridian, in Kay County, State of Oklahoma, and that the defendant, Luttie B. Jones, under the patent issued to her therefor on March 15, 1909, holds the legal

title to the same in trust for the said owners thereof, fixing the undivided interests therein of the said respective heirs, ordering that the said Luttie B. Jones and Elmer Jones make a good and sufficient deed conveying said premises to said owners thereof, and adjudging and decreeing that the mortgage given by said Luttie B. Jones and Elmer Jones thereon to P. H. Albright, August 1, 1908, and on that day filed and recorded in the office of the Register of Deeds of Kay County, Oklahoma, in Book of Mortgages 34, page 87, and afterward on September 1, 1908, assigned by said Albright to the said Phoenix Mutual Life Insurance Company, does not constitute any incumbrance upon said premises and that said mortgage be cancelled,

set aside and held for naught, and adjudging that said heirs
145 have and recover from the said Luttie B. Jones and Elmer Jones and the Phoenix Mutual Life Insurance Company the costs of the suit taxed at \$— and in lieu thereof, said State Supreme Court erred in remanding said cause to said district court of Kay County, Oklahoma, with directions to set aside the decree in toto and enter a judgment in favor of the said Luttie B. Jones, and against the said heirs at law of Hollen H. Fearnow, and this the said State Supreme Court so did, erroneously upon its erroneous holding that "In its opinion the decree rendered by the trial court is erroneous in its entirety," for that said State Supreme Court erroneously in its said decision held "the decision of the (trial) court turned on the question whether the land department erred in declining to inquire into the validity of the marriage of the entryman Fearnow and the defendant Luttie B. Jones, in a certain contest proceeding instituted against her by his heirs," and then specifically holding "the question of whether the original entryman, Fearnow, and the defendant, Luttie B. Jones, nee Fearnow, were legally married is in no manner material to a determination of this case," thus ruling directly contrary to the letter and spirit of Section 2291, U. S. Rev. Stats., on the disposition of an unproved up homestead entry where the homesteader dies prior to final proof leaving no widow but leaving "heirs at law," which Act of Congress, when properly applied to the admitted facts herein in connection with the Statute Law of Kansas and Oklahoma, stamped the purported marriage as incestuous, illegal, prohibited and void, and that said Luttie B. was not the widow of Hollen H. Fearnow, and that her act in relinquishing said Hollen H. Fearnow's entry "as his widow," and simultaneously with such void relinquishment making a homestead of the tract in her own private right as a mere qualified homestead entrywoman, under section 2290, U. S. Revised Statutes, was unauthorized, that, not being his widow, she had no right to relinquish his entry; and in connection therewith said State Supreme Court in its last mentioned decision, upon the admitted facts that the U. S. Land Office, Commissioner, and Secretary of the Interior, rejected a contest by said heirs attacking said relinquishment by said pretended widow, and her concurrently entering said land not as his widow, but otherwise, said rejection being on the ground that
146 the allegations of the contest affidavit were insufficient, erred in holding that the said Register and Receiver, Commissioner

and Secretary did not err in rejecting said contest, although prior thereto said State Supreme Court in a prior proceeding in error in said matter and case between said parties, settled the law of the case contrawise by its said prior decision in 34 Oklahoma, 694, which subsequent decision to the 34 Oklahoma, supra, was not only contrary to "the law of the case" aforesaid, but was contrary to Section 2291 U. S. Revised Statutes, and contrary to the provisions of the Federal Constitution against depriving citizens of the United States of their rights and property without giving them their day in court, and against the unlawful and erroneous deprival of said heirs; said rights and property under the donee provisions of said section 2291, and said donee's proceedings thereunder, so far as they were not prevented, by the said acts of said Luttie B. Jones, née Fearnow, and by the said mistakes and errors of law of the said officers of said Land Department upon the admitted facts, such deprival being contrary to those provisions of the Federal Constitution and the amendments thereto, prohibiting such deprivals as being without, and contrary to, due process of law; said State Supreme Court being the highest state court in said state wherein said case and matter could be tried and finally determined within said State.

XIII.

The State Supreme Court aforesaid erred in overlooking, and ignoring the decision, letter 'H' by Assistant Commissioner Fimple, of January 30, 1905, and particularly that part thereof setting aside the cancellation and all the proceedings had before the U. S. Land Office at Guthrie, Oklahoma, under the Lena Barnes contest upon the mooted charge of "speculation," against the entry of Hollen H. Fearnow in his lifetime, which contest was never tried the second time, and which after his death was not revived against his heirs and which was finally on November 26, 1906, dismissed, and by so ignoring gave force and construction thereto, to which it was not entitled by and through misapprehension of the facts and law, thereby erroneously upholding the opinion of the Acting Secretary of the Interior of date September 1, 1907, upon the position
147 erroneously and falsely assumed by said State Supreme Court, that Assistant Secretary Jesse E. Wilson had denied said heirs' contest against said Luttie B. Jones, not only because it was immaterial when she relinquished Hollen H. Fearnow's entry, was his widow or not, but also "upon two additional grounds, to-wit: "the mooted and purported 'speculativeness' of Hollen H. Fearnow's entry, and the purported question of "laches" of the heirs, in asserting their claim as such under Section 2291 U. S. Revised Statutes by their attacking the act of said Luttie B., as pretended widow under Sec. 2291, in relinquishing Hollen H.'s entry and simultaneously making an entry, not as widow, but in her own right, under Sec. 2290, U. S. Revised Statutes. Whereas, there is not a single word, phrase, sentence or paragraph in Acting Secretary Jesse E. Wilson's decision of September 1, 1907, in *Doepel et al. v. Luttie B. Jones et al.*, referring to said mooted "speculativeness," and said

portion of the opinion of said State Supreme Court is without any evidence whatever to support it; and, furthermore, the only evidence before the Land Department at any time as to "speculativeness" was in the Lena Barnes contest taken ex parte and without jurisdiction, which is in Assistant Commissioner Fimple's decision of January 25, 1905, in Lena Barnes v. Hollen H. Fearnow, setting aside the R. and R. decision plead in the answer herein, and Fimple's reasons are as follows: "the testimony submitted by the plaintiff (Lena Barnes) showed in substance that prior to the date of Fearnow's entry, his sister had made a homestead entry of the land embraced therein; that before making her said entry, this sister had purchased the relinquishment of an entry of said land, then existing for which she paid four or five hundred dollars, furnished by her mother; that she verbally agreed with her brother, the defendant, that he should make entry of the land, hold the same for fourteen months, make final proof therefor and deed the said tract to his mother in exchange for a wagon, harness and team of horses; or, in the event she and her mother did not desire him to so make final proof, that he would pay to his mother rent for the land; that defendant paid such rent for two years, and then refused to longer do so; that there was much bad feeling existing between defendant and other members of the family; and that the plaintiff was a sister, other than the one who had purchased the relinquishment as aforesaid;" "that to set aside the proceedings in Lena Barnes' case motion and affidavit in support thereof was filed," showing the witnesses and facts upon which the defense was based, that such defense was a meritorious one; that the case, made by the plaintiff could, as he verily believed, be completely disproved, and the fact established that the entry was made in good faith * * * that both of these persons are witnesses (plaintiffs' witnesses, Lena Barnes' Witnesses) whose reputation for truth and veracity is very bad, and that their neighbors will not believe them under oath," the State Supreme Court erred in overlooking or ignoring the foregoing, upon which Ass't Com'r Fimple vacated the judgment of cancellation, the defendants in this case plead as a purported defense, hence the decision of the Oklahoma State Supreme Court is without issue, fact or law to support it on "speculativeness," and is erroneous; the said State Supreme Court being the highest State Court in said State wherein said cause and matter could be tried and finally determined within said State.

XIV.

The Said State Supreme Court, in its final decision herein of February 8, 1916, against said heirs at law erred in confusing and misstating the decision of Honorable Jesse E. Wilson, acting Secretary of the Interior, of September 1, 1907, in the Emma F. Doepel case, with the decision by Assistant Commissioner, J. H. Fimple of January 20, 1905, in the Lena Barnes case. The Barnes case was never appealed to the Secretary, upon the mooted question of "speculative-

ness" in Hollen H. Fearnow's homestead entry, there not being anything whatever, in the said Secretary's decision, on said question. And by the said Commissioner Fimple's decision in the Barnes case, said charge of "speculativeness" was determined and the R. and R.'s decision thereon overruled, and all proceedings upon which the R. and R. decision was based were vacated and set aside; and said State Supreme Court likewise similarly erred in not holding upon the undisputed facts that said R. and R. later on upon Lena Barnes dismissing said charge of "speculativeness" finally determined said charges of Lena Barnes adversely to said purported "speculativeness" thus foreclosing such charge and attack thereunder against said entry by any subsequent contest on the same transaction. And said State Supreme Court overlooked the undisputed fact that Hollen H.

149 Fearnow had in his lifetime tendered a perfect and complete defense before said Land Department and which said commissioner Fimple had sustained in the favor of said Hollen H. Fearnow by his decision thereon, which had become final, as aforesaid, and this the said State Supreme Court had so held in its prior decision, reported in 34 Oklahoma 649, upon demurrer to the petition which exhibited each and every of said Departmental decisions as parts thereof, and it also erred in not following "the law of the case," as prior thereto held by it, for the agreed statement thereon referred to said petition, which included said departmental decisions as controlling, and not any independent fact, extraneous to the matters embraced in said departmental decisions. And the petition having been sustained, upon proofs, before the "trial court" which also showed that the judgment of the cancellation by R. and R. in the Barnes case had been vacated and set aside and rendered ineffective, as a defense against either said Hollen H. Fearnow or his heirs at law; and premises considered, the said State Supreme Court in its last decision in above cause, violated the letter and spirit of said Act of Congress known as Sections 2291 and 2292, United States Revised Statutes, the provision of the Federal Constitution in respect to depriving said heirs of their property rights and property, contrary to the provisions of said Constitution and the amendments thereto, and contrary to the principles of due process of law, in that it set aside the judgment and decree, awarding them said property and directed and rendered a contrawise judgment and decree in favor of Luttie B. Jones by its misapplying the law to the undisputed facts, and erroneously created a class upon which to visit penalties and forfeitures prescribed by Congress, when such class was not within said Act of Congress, and inflicted a forfeiture of said heir's rights and property under the donee provisions of said Section 2291 and 2292, without fact or law to support same, contrary to said Constitution and the principles thereof aforesaid on due process of law; the said State Supreme Court being the highest State Court in said State wherein said cause and matter could be tried and finally determined within said state.

XX.

150 The said State Supreme Court erred in not following its prior decision by Judge C. B. Ames, in 34 Oklahoma 649 on the matter that said heirs had preserved their rights under Sections 2291 and 2292, United States Revised Statutes and were not guilty of delay, when is considered the preventive denials and delays, by the segregation of said tract of land by and through the neglect and mistakes of law of the officers of the said United States Land Office, the deception and falsehood practiced by said Luttie upon them, and the erroneous subsequent and consequent acts of the said officers of said local office and of the Land Department aforesaid subsequently to the reinstatement of Hollen H. Fearnow's entry upon the final determination of the Lena Barnes contest against it, whereby said heirs were prevented from making an entry prior to patent, thus leaving to them as their only remedy, the case at bar, which remedy said State Supreme Court erroneously denied them in its last decision, upon the ground of delay of the heirs in making entry (when delay was not plead in the answer); whereas said "delay" as shown by the admitted facts, was occasioned solely by said Luttie B. Jones (a person without right, under the admitted facts and said sections 2291 and 2292) and by her deception, imposition and fraud, practiced upon the officers aforesaid, and the latter's illegal and erroneous acts procured thereby; the said State Supreme Court being the highest State Court in said State wherein said cause and matter could be tried and finally determined within said State.

XXI.

The State Supreme Court of Oklahoma erred in not holding that Acting Secretary of the Interior did err upon the admitted facts in the Doepel et al. affidavit of contest against Luttie B. Fearnow's relinquishing Hollen H. Fearnow's entry, and simultaneously making an entry as a single woman (admitted as upon demurrer by motion to dismiss because the allegations were sufficient), for under said allegations, the heirs plead their prior right to consummate an entry of said land, not under the law of the State on descents and distributions, but under the right and grant cast by Congress under Section 2291, U. S. Revised Stats., in like cases where there was no surviving widow, for such was and is a prior right, notwithstanding the erroneous finding and holding to the contrary in the decision by Acting Secretary of Interior, Jesse E. Wilson of
151 September 1, 1907, and which Secretary should have held as subsequently did Judge Ames and his associates in the Oklahoma Supreme Court, reported in 34 Okla. 649, to-wit: that the said heirs by filing their said contest to set aside the said relinquishment of Hollen H. Fearnow's entry, made by Luttie B., as pretended widow of Hollen H., and to cancel her homestead under Sec. 2289 made immediately thereafter, which contest was so filed on December 10, 1906, within 12 days after said relinquishment by Luttie B. was made on November 28, 1906, was in due time, and

preserved the rights of said heirs under Section 2291 aforesaid, instead of erroneously holding as did said Acting Secretary Jesse E. Wilson on September 1, 1907, in saying "their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry." The said decision of February 8, 1916, by said Supreme Court herein was otherwise contrary to law, for no issue of "laches" was plead or proven, and under said facts in said cause said Luttie B. was not in a position to plead or prove laches, and under the admitted facts and the law in regard to prevention, by her acts, and by mistake of law of said officers in said Land Department, there was not any "laches." And said heirs in said State Supreme Court were deprived of a hearing on said matter of laches, as it was not plead in the petition in error, such deprival being contrary to due process of law, as guaranteed by the Federal Constitution; and the said State Supreme Court being the highest State Court in said State wherein said cause be tried and finally determined, within said State.

Wherefore, the said defendants in error, in this the Supreme Court of the State of Oklahoma, excepting the said Insurance Company, the holder of said mortgage, pray that said decrees, orders and judgments made and entered in this the Supreme Court of the State of Oklahoma in the above cause and complained of in these assignments of error, and each and every of them, be reversed, and that said Supreme Court be directed to affirm the said judgment and decree of the district court of Kay county, Oklahoma, in favor of the said plaintiffs in said cause in said district court, and for such other and further relief in harmony with the decree in the Kay county district court, according to law and equity and usages

152 in courts of equity, as they the said Emma F. Doepel et al., heirs at law of Hollen H. Fearnow, deceased, are entitled to under the donee beneficiary provisions of the Act of Congress of the United States, known as Section 2291, Revised Statutes of the U. S., and the Constitution thereof, as they are entitled to on the face of said record, in connection with each and every of the errors committed by the Supreme Court of the State of Oklahoma, appearing in the said judgment and decree of the said Supreme Court of the State of Oklahoma, aforesaid, and set forth in the said petition for rehearing, duly filed therein by the said heirs and denied without a hearing by the said State Supreme Court of Oklahoma, and of the said errors of said State Supreme Court not only in its said decision, in directing a final judgment against the heirs at law of Hollen H. Fearnow, deceased, in favor of the said Luttie B. Jones and her then husband, Elmer Jones, aforesaid, but also in consequence of each and every of the said errors therein, and also in consideration of each and every one of the said errors in overruling and denying said heirs' petition for rehearing in said cause appear-

ing on the face of the record herein, and said heirs at law will ever pray.

L. A. MARIS,
MILTON BROWN,

*Attorneys for Emma F. Doepel et al., Heirs at Law of
Hollen H. Fearnow, Deceased, and Defendants in Error.*

Endorsed: 5978. Jones et al. vs. Fearnow et al. Assignments of Error. (Filed May 18, 1916. William M. Franklin, Clerk.)

153 Know all men by these presents: That we, Emma F. Doepel, Richard T. Fearnow, Ethel T. Turner, Hilary Turner, Lester Turner, Cecil Turner, Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew and R. C. Fearnow, defendants in error, as principals and the United States Fidelity and Guaranty Company, as surety,

Are held and firmly bound unto Luttie B. Jones, Elmer Jones and The Phoenix Mutual Life Insurance Company, plaintiff in error, in said State Supreme Court as below specified, in the full sum of Five Hundred Dollars, to be paid to the said Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company, their respective heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 17th day of May, in the year of our Lord One Thousand Nine Hundred and Sixteen.

Whereas, lately at the February sitting of the Supreme Court of the State of Oklahoma, on Feby. 8th, 1916, in a suit pending in said court, No. 5978 between the above named defendants in error, Emma F. Doepel et al., as heirs at law of Hollen H. Fearnow, dec'd., were plaintiffs in the trial court and the above named Luttie B. Jones and her husband, Elmer Jones and the Phoenix Mutual Life Insurance Company, plaintiffs in error in the said Supreme Court, were defendants in said trial court, a final decree was rendered against the said plaintiffs in the said trial who were the defendants in error in said Supreme Court and also in favor of said Luttie B. Jones and Elmer Jones, her husband and said Life Insurance Company as mortgagee, claiming a lien under said Luttie B. Jones and Elmer Jones, and the said heirs at law, Emma F. Doepel and her associates as first herein in this bond named obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and

a citation directed to the said Luttie B. Jones and Elmer

154 Jones, her husband, and to the said Phoenix Mutual Life Insurance Company, admonishing them to be and appear in the United States Supreme Court, at the City of Washington, D. C., sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said heirs at law, Emma F. Doepel, et al., as above named shall prosecute the said Writ of Error to effect, and answer all damages

and costs, if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

EMMA F. DOEPEL ET AL., [SEAL.]
Heirs at Law of Hollen H. Fearnow, Dec'd, [SEAL.]

By L. A. MARIS, [SEAL.]

Their Attorney and Agent,
Principals.

[SEAL.]

UNITED STATES FIDELITY AND
 GUARANTY COMPANY,

By ED M. SEMANS,

Its Attorney in Fact, Surety.

Approved by—

MATTHEW J. KANE,

Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed: No. 5978. In the Supreme Court of the State of Oklahoma. Luttie B. Jones et al. vs. Emily F. Fearnow et al. Bond in Error. (Filed May 18, 1916. William M. Franklin, Clerk.)

155 16th Subdivision.

The United States of America to Luttie B. Jones, Elmer Jones and
 The Phoenix Mutual Life Insurance Company:

You and each of you are hereby cited and admonished to be and appear in the United States Supreme Court at the City of Washington, D. C., sixty days from and after the day this citation bears date, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein Emma F. Doepel, et al., heirs at law of Hollen H. Fearnow, deceased, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment and decree of said State Supreme Court rendered against the said heirs at law of Hollen H. Fearnow, deceased, as in said Writ of Error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Matthew J. Kane, Chief Justice and Presiding Judge of the Supreme Court of the State of Oklahoma this 18th day of May, A. D., 1916.

MATTHEW J. KANE,

*Chief Justice and Presiding Judge of the
 Supreme Court of the State of Oklahoma.*

Attest:

[SEAL.]

WM. M. FRANKLIN,

Clerk of the Supreme Court of the State of Oklahoma.

Endorsed: No. 5978. Jones et al. vs. Fearnow et al. Citation. May 19, 1916. Service of a copy of this Citation is hereby accepted by the receipt of a copy thereof. J. F. King, Attorney of record for Luttie B. Jones, Elmer Jones and The Phoenix Mutual Life Insurance Company. (Filed May 23, 1916. William M. Franklin, Clerk.)

156

17th Subdivision.

(Filed Jun- 6, 1916. William M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error.

VS.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants; The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Præcipe of Emma Doepel et al., and Their Designation on Making up the Record in This Case.

The Clerk of the Supreme Court of Oklahoma, in making up the record in the above entitled cause under the writ of error granted by the Chief Justice of this court for the purpose of having the judgment of this court reviewed by the United States Supreme Court will, in making up the transcript record, include therein the following papers and records in his office, to-wit:

(1) The decision of said State Supreme Court in case No. 1930, being a cause between the same parties to the case at bar and over the same cause of action and petition thereon, wherein this court sustained the petition of the plaintiff upon demurrer and remanded the case to the Kay County district court for further proceedings consistent with said opinion.

(2) In said transcript as the 2d subdivision thereof, instead of literally copying the petition in the action and trial court as set forth in the case No. 1930 aforesaid, write this statement: "The case-made filed in the Supreme Court in said case No. 1930 contained a copy of the same petition and exhibits thereof made in the same manner and form as hereinafter set up in the case-made in this case, to-wit: No. 5978, as hereinafter set forth."

(3) As the third subdivision of the transcript record please write this statement: "That after this State Supreme Court had held said petition good upon demurrer, the defendant, Luttie B. Jones et al., filed a petition for a rehearing and as a part of said petition for rehearing filed and submitted to said State Supreme Court a copy of the transcript upon appeal of the case of Lena Barnes vs. Hollen H. Fearnow from the United States Land Office at Guthrie, Oklahoma, to the Commissioner of the General Land Office of the United States."

(4) As the 4th subdivision of the said transcript set out a copy of the petition in error filed in this court by Luttie B. Jones et al., in case No. 5978, together with the acceptance of service of summons

in error in said cause by the respective attorneys for the defendants in error therein.

157 (5) As the 5th subdivision of said transcript set out the assignments of error filed in this court for the plaintiffs in error and printed at page 48 of their printed brief.

(6) Set out the three counter assignments filed by L. A. Maris, attorney for Emma F. Doepel et al., as set forth at pages 16 and 17 of the latter's brief and abstract transcript.

(7) As the 7th subdivision set out the assignments of error filed by The Phoenix Mutual Life Insurance Company in the Supreme Court of Oklahoma as appears at pages 48 to 50 of their brief and abstract No. 5978.

(8) Set out as the next subdivision of said transcript the case-made filed in this court No. 5978.

(9) As the 9th subdivision of the said transcript set out this statement in lieu of papers and proceedings upon motion to dismiss, to-wit: "The defendants in error, in No. 5978, except said Insurance Company, filed therein a motion to dismiss said case No. 5978, because among other reasons, it, the said case-made did not contain a recital therein that said case-made contained all of the evidence used in the trial court, and that said motion was overruled by this court as appears in the record and in the decision thereon in — Oklahoma report, —, 149 Pacific, 1138."

(10) As next subdivision of this transcript, please copy at this place each and every order of the court in case 5978 showing the suggestions of the death of various parties to this suit and the revivor of the action in the name of the proper surviving parties, setting out said orders in full.

(11) As the 11th subdivision of said transcript of said record set out the entry on the Journal of this court showing the submission of this case No. 5978 to this court and follow the same with each consecutive entry showing the filing of the opinion herein, and also follow same by setting out a copy of the petition for rehearing filed herein.

(12) As next subdivision show entry denying a hearing on said petition for a rehearing, copying said entry of denial in full as appears upon the records of this court.

(13) Set out the entry on the Journal of this court showing the exceptions to the decisions of this court in said case as taken by Emma F. Doepel et al., being the associate and all the heirs of Hollen H. Fearnow, deceased, and donee beneficiaries under the act of Congress known as Section 2291 United States Revised Statutes.

(14) Set out the petition for the allowance of writ of error herein and etc., together with the order of the Chief Justice of this court allowing said writ and fixing the bond and etc.

(15) Set out assignments of error filed herein by Emma F. Doepel et al., aforesaid, and set out the bond in error filed herein by Emma F. Doepel et al.

(16) Set out the citation issued herein and served upon J. F. King, attorney for Luttie B. Jones, Elmer Jones and The Phoenix

Mutual Life Insurance Company together with his acceptance of service thereof.

158 (17) Here copy in the transcript of record this præcipe and designation, together with any acceptance of service thereof by, or proof on, J. F. King, attorney aforesaid, and if meanwhile within the time provided by law said King shall have served a counter designation, and the same shall have been consented to or allowed by the court, then copy in said counter designation and whatever may be required by law and the orders of the court to be included thereunder in the record; if said King should fail to serve and file a counter designation within the time required by law, then conclude said transcript by attaching thereto your certificate under seal of this court with said transcript as a true and correct transcript etc., as provided by law.

Respectfully submitted,

L. A. MARIS,
MILTON BROWN,
*Attorneys for Emma F. Doepel et al.,
Defendants in Error Herein.*

Endorsed: No. 5978. In the Supreme Court of the State of Oklahoma. Luttie B. Jones, et al., plffs. in error, vs. Emily F. Fearnow et al., defts. in error. Præcipe and designation by defendants in error on making transcript of record for U. S. Supreme Court. (Filed Jun- 6, 1916. William M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES et al., Plaintiffs in Error,
vs.
EMILY F. FEARNOW et al., Defendants in Error.

Acknowledgment of Service of Præcipe.

Come now the plaintiffs in error and the cross-petitioner, the Phoenix Mutual Life Insurance Company, and acknowledge that they have been served with copy of the "præcipe of Emma F. Doepel et al., and their Designation on Making up the Record in this Case," this 3rd day of June, 1916.

J. F. KING,
*Attorney for the plaintiffs in Error and for
the Defendant and Cross-petitioner in
Error, The Phoenix Mutual Life Insurance
Company.*

(Filed Jun- 6, 1916. William M. Franklin, Clerk.)

Endorsed: No. 5978. Jones et al., vs. Fearnow et al. Acknowledgment by J. F. King, Atty. for Jones et al., of service of præcipe

and designation by Emma Doepel et al., on making up transcript of record to Supreme Court of United States. (Filed Jun- 6, 1916. William M. Franklin, Clerk.)

159 In the Supreme Court of the State of Oklahoma.

No. 5978.

LUTTIE B. JONES and ELMER JONES, Plaintiffs in Error,

vs.

EMILY F. FEARNOW, ETHEL T. TURNER, EMMA F. DOEPEL, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, The Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

Certificate of Clerk of Supreme Court of the State of Oklahoma.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing, pages 1 to 158 inclusive, is a full, true and complete copy of the record and proceedings as per præcipe of Emma F. Doepel, et al., on making up the record, filed in the Supreme Court of the State of Oklahoma on June 6, 1916, in the above entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the seal of said Court, at Oklahoma City, State of Oklahoma, this the 3d day of July, A. D., 1916.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN, *Clerk*,

By N. C. ORR,

*Deputy Clerk of the Supreme Court
of the State of Oklahoma.*

160 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court for the State of Oklahoma, Greeting:

Because, in the records and proceeding, as also in the rendition of the judgment of a plea which is in the said State Supreme Court, before you, at the January Term, 1916 thereof, on to-wit: respectively Feby. 8, 1916, and April 4, 1916, denying a rehearing, between Emma F. Doepel et al., heirs at law of Hollen H. Fearnow, deceased, and Luttie B. Jones, Elmer Jones, her husband and the Phoenix Mutual Life Insurance Company and in reversing the judgment of the trial court and directing a contrawise decree in said case, a manifest error hath happened, to the great damage of the said Emma F. Doepel, et al., heirs at law of Hollen H. Fearnow, deceased, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C. and filed in the office of the Clerk of the United States Supreme Court, on or before the 18 day of July, 1906, to the end that the record and proceedings aforesaid being inspected, the U. S. Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 18 day of May, in the year of our Lord one thousand nine hundred and sixteen.

Issued at office in Oklahoma City with the seal of the District Court of the U. S. for the Western District of Oklahoma and dated as aforesaid.

[SEAL.]*

ARNOLD C. DOLDE,

*Clerk of the District Court of the United States,
Western District of Okla.*

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Allowed by—

MATTHEW J. KANE,

*Chief Justice of the Supreme Court
of the State of Oklahoma.*

Endorsed: No. 5978. Luttie B. Jones et al. vs. Emily F. Doepel, et al. Writ of Error to U. S. Supreme Court. (Filed May 18, 1916. William M. Franklin, Clerk.)

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of the Writ of Error as filed in my office in the case of Luttie B. Jones et al., plaintiffs in error, vs. Emily F. Doepel et al., defendants in error, No. 5978.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN, *Clerk.*

By N. C. ORR,

*Deputy Clerk of the Supreme Court
of the State of Oklahoma.*

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UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court for the State of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said State Supreme Court, before you, at the January Term, 1916, thereof, on towit, respectively Feby. 8, 1916, and April 4th, 1916, denying a rehearing, between Emma F. Doepel et al., heirs at law of Hollen H.

Fearnow, deceased, and Luttie B. Jones, Elmer Jones, her husband, and The Phoenix Mutual Life Insurance Company, and in reversing the judgment of the trial court and directing a contrawise decree, in said case, a manifest error hath happened, to the great damage of the said Emma F. Doepel et al., heirs at law of Hollen H. Fearnow, deceased, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court, on or before the 18th day of July, 1916, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 18th day of May, in the year of our Lord one thousand nine hundred and sixteen.

Issued at office in Oklahoma City with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

[Seal of the District Court of the United States, Western
District of Oklahoma.]

ARNOLD C. DOLDE,
*Clerk of the District Court of the United States,
Western District of Oklahoma.*

Allowed by—

MATTHEW J. KANE,
*Chief Justice of the Supreme Court
of the State of Oklahoma.*

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

In obedience to the command of the within Writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the Supreme Court of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
*Clerk of the Supreme Court of
the State of Oklahoma.*
By N. C. ORR, *Ass't.*

163 [Endorsed:] No. 5978. Luttie B. Jones et al. vs. Emily F. Doepfel et al. Writ of Error to U. S. Supreme Court. Filed May 18, 1916. William M. Franklin, Clerk.

164 In the Supreme Court of the United States, October Term, 1916.

No. 571.

EMMA F. DOEPFEL, and EMMA F. DOEPFEL, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, Infants, and said Infants also by L. A. Maris, Their Guardian ad Litem; R. C. Fearnow, and R. C. Fearnow, as Administrator of the Estate of Emily F. Fearnow, Deceased, and C. A. Johnson, Administrator of Ethel Turner, Deceased, and Percy Hill, Plaintiffs in Error,

vs.

LUTTIE B. JONES, ELMER JONES, Her Husband, and THE PHOENIX Mutual Life Insurance Company, a Corporation, Defendants in Error.

Statement of the Points on Which Plaintiffs in Error Intend to Rely in the Above Cause and of the Parts of the Record Which They Think Necessary for the Consideration Thereof.

Come now the above named plaintiffs in error and hereby state to the court the following as the points on which they will and intend to rely in the above cause in the United States Supreme Court for a reversal of the decision and judgment of the Supreme Court of the State of Oklahoma, which last decision and judgment reversed the judgment and decree rendered in the favor of said plaintiffs in error and their predecessors against the said defendants in error decreeing said plaintiffs in error the real and equitable owners, as donee beneficiaries under section 2291 of the Revised Statutes of the United States of America, to and of the following described real estate situated in the Kay County, State of Oklahoma to-wit: The Southwest quarter of section 11 in Township 26 North of Range 1 East of the Indian Meridian and that the said Luttie

165 B. Jones held said real estate in trust for the said plaintiffs in error and their predecessors, and that the mortgage given by said Luttie B. Jones and Elmer Jones, her husband, to one P. H. Albright and by him assigned to the said The Phoenix Mutual Life Insurance Company, a corporation, prior to the patent from the United States to said Luttie B. Jones for said land did not constitute any lien or incumbrance upon said premises and that said mortgage be cancelled, set aside and held for naught, and adjudging that said Luttie B. Jones and her husband, Elmer Jones shall make a good and sufficient deed conveying said premises to

said owners thereof, being the plaintiffs in error and their predecessors, by the term "predecessors" is meant other heirs of Hollen H. Fearnow, deceased, and original entryman of said land which other heirs died during the pendency of the aforesaid litigation and these plaintiffs in error had the cause revived in them as such heirs and successors as provided by the laws of the State of Oklahoma; that the last decision of the Supreme Court of the State of Oklahoma herein complained of set aside in toto the judgment and decree aforesaid of said Kay County District Court and adjudged and decreed the entering in lieu thereof a judgment in favor of the defendants in said trial court known as Luttie B. Jones et al. The said plaintiffs in error in these proceedings objected and excepted to the said decision judgment and decree of the Supreme Court of the State of Oklahoma, and duly filed in said State Supreme Court their petition for the rehearing specifying among other things that the said last decision of the Supreme Court of Oklahoma was erroneous and contrary to law and upon the undisputed facts and the law thereon deprived said plaintiffs in error as aforesaid of their rights and property under the provisions of section 2291 of the United Revised Statutes of the United States of America and of the grant cast in their favor by said Act of Congress to said land as disclosed by the undisputed facts in said cause and that as the

166 only heirs at law of said deceased entryman Hollen H. Fearnow, there being no widow, they were entitled to said land under the provisions of said section 2291 of said United States Revised Statutes, and that the proceedings and decision of the Department of the Interior upon the undisputed facts in the contest brought by said Emma F. Doepel, et al., against Luttie B. Jones to vacate and set aside a relinquishment made by her of the Hollen H. Fearnow homestead entry as his widow, when upon the undisputed facts and the law she was not his widow, was erroneous and a mistake of law and being made upon a motion of said Luttie B. Jones to dismiss said contest, erroneously and illegally upon the facts admitted by said motion, deprived the said heirs of their day in court and in view of the subsequent proceedings permitting said Luttie B. Jones to make final proof to and receive a patent for said land, illegally and erroneously deprived said heirs as the designated donee beneficiaries under said section 2291 and the admitted facts, of their rights and property in and to said land contrary to and in violation of the provisions of the Constitution of the United States and of Article fourteen of the amendment thereto, forbidding the deprivation of the rights and property of a citizen of the United States without due process of law, and that the said State Supreme Court of Oklahoma in its last mentioned decision aforesaid similarly deprived said heirs and these plaintiffs in error of their rights and property under said act of Congress, section 2291 United States Revised Statutes and the admitted facts aforesaid, of their rights and property in and to said land as aforesaid, contrary to and in violation of said provisions of the Federal Constitution and Article fourteen of the amendment thereto.

Second Point.

As a second point upon which the plaintiffs in error herein rely they state that the said cause between the said heirs on the one hand and the said Luttie B. Jones et al., on the other hand was once before taken from said Kay County District Court to said State Supreme Court of Oklahoma upon error to review a decision
167 of said Kay County District Court sustaining a demurrer by said Luttie B. Jones to the petition of said heirs to declare the patentee aforesaid trustee for the real owners and to declare a resulting trust; that in said first appeal in the Supreme Court of Oklahoma reversed the trial court and directed it to over rule the demurrer to the petition and therein held that under the facts admitted by the demurrer said Luttie was not the widow of the entryman, that the Land Office had erred in the application of the law to the facts and that by their contest the said heirs had preserved their rights before the Land Office, and upon the facts plead in the petition were entitled to have a resulting trust declared, and said State Supreme Court remanded said cause to said Kay County District Court for further proceedings consistent with the law as declared in its said opinion and decision overruling said demurrer to said heirs' petition; that after said remand the said Luttie B. Jones and Elmer Jones, her husband, filed a separate answer and also did the said The Phoenix Mutual Life Insurance Company and in each of said answers there was admitted the facts plead by said heirs in said petition, except they omitted and avoided to state that when the said Hollen H. Fearnow and Luttie B. Jones went through the form of a marriage in the State of Kansas they were first cousins, and as a purported defense set up in brief that during the lifetime of Hollen H. Fearnow one Lena Barnes had filed a contest against the entry of said Hollen H. Fearnow charging the said entry to be speculative but omitted to state in said answers except by a copy of certain decisions appearing as exhibits in the case that said charge of speculativeness was in effect over ruled by the decision of the Hon. Commissioner J. H. Fimple, and further set up in said answers the improvements and monies, paid out by said Luttie B. Jones on account of said land; there was no other defense whatever plead or attempted to be plead in said answers than the decision of the Register and Receiver on said speculativeness; that
the said exhibits showed that the said decision of the Register
168 and Receiver had been reversed and over ruled by the Honorable Assistant Commissioner of the General Land Office. To said answers and each of them the said heirs filed in the said Kay County District Court their respective motions to strike out of the said separate answers those parts thereof setting up the said charge of speculativeness as constituting no defense to the said heirs' cause of action and attempting to raise immaterial issues and surplusage matter, which several motions were over ruled by the trial court and exceptions — thereto; that then said heirs filed their reply denying the allegations of said new matter in said answer

and setting up the decision of hte said Assistant Commission- of the General Land Office by letter "H" January 20, 1905, setting aside all the proceedings in the said Lena Barnes contest including the said Register and Receiver decision and cancelling a home stead entry allowed said Lena Barnes in the interim, and showing that Lena Barnes dismissed her contest on November 28, 1908. Upon the issues thus framed the case was tried before the Kay County District Court without a jury upon the pleadings, documentary evidence and other testimony, resulting in the judgment and decree hereinbefore mentioned as having been rendered by the trial court in favor of said heirs against said Luttie B. Jones and her husband, and against the holder of said age, and upon the above the further contention and point made that the State Supreme Court of Oklahoma in its last n and opinion and being the one herein complained of erroneously went outside of the issues in the case and based its decision reversing the decree of the trial court and directing a decree for said Jones and said insurance company in part upon the purported doctrine of laches when there was no laches plead against said heirs in the answer and in its prior opinion said State Supreme Court erred said heirs had preserved their rights by their contest proceedings and there was no proof in the record showing any delay on the part of said heirs in asserting their rights and the admitted facts showed that they had asserted their rights promptly and in due and reasonable season as far as they

169 were permitted to do by the actions of the officials of the local U. S. Land Office, the Commissioner of the General Land Office and the Secretary of the Interior, and the erroneous and illegal acts of Luttie B. Jones and Lena Barnes based thereon, and the point is made that the said portion of the decision of the Supreme Court of the State of Oklahoma on the purported laches is contrary to the undisputed facts and the law and thereby deprives the said heirs of their said rights and property under said act of Congress and said admitted facts, contrary to and in violation of the provisions of the Federal Constitution and Article fourteen of the amendment thereto as hereinbefore specified.

Third Point.

As a third point said plaintiffs in error specify that the said Oklahoma State Supreme Court furthermore erroneously based its opinion and decision reversing said trial court's decree and directing a decree against said heirs and in favor of said Luttie B. Jones in part upon the purported defense of speculativeness, whereas the separate answers by the said Luttie B. Jones and *and* the said mortgage holder said insurance company only plead the purported verbal contract claimed to have been made between Hollen H. Fearnow and his mother in her life time and as charged in the contest by Lena Barnes against Hollen H. Fearnow in his life time, which answers also set up the decision of the Register and Receiver made ex parte and without jurisdiction, omitting to state in the answer that said Register and Receiver was subsequently vacated and set aside and said Lena

Barnes contest subsequently dismissed by her, and no such question was presented or raised by said Luttie B. Jones as contestee in her defense of the contest against her void entry brought by said Emma F. Doepel and others, and the point is now and here made that

(A) Said question was never before the Land Department except in the Lena Barnes contest which was a proceeding separate and distinct from the contest proceeding which this suit was brought to review.

(B) That even in the Lena Barnes contest although irrelevant to this case the final adjudication was against said issue of
170 speculativeness.

(C) That the only testimony by witnesses on said charge is that set forth in the transcript of the proceedings in the Lena Barnes contest as contained in the decision by the Hon. Commissioner J. H. Fimple, Assistant Commissioner, of letter "H" on January 20, 1905, which said Commissioner Fimple held in connection with Hollen H. Fearnow's statement in support of an application to set aside the said Register and Receiver's decision, were insufficient charges, and in effect held that on said Hollen H. Fearnow's showing he had a defense that was a meritorious one and could establish that said entry was made in good faith, etc., then Commissioner Fimple reversed the decision of the Register and Receiver on said charge of speculativeness and remanded said cause and said Barnes contest was dismissed without further proceedings therein after the mouth of Hollen H. Fearnow was sealed in death.

(D) That said purported defense of speculativeness as attempted to be plead by said Luttie B. Jones *amace*-fide holder of the said premises was not a proper matter of defense interpleable in an equity proceeding by her;

(E) That the purported defense of speculativeness in the entry by Hollen H. Fearnow is not a matter which could be set up against the grant and right cast by the Act of Congress upon the heirs of a deceased entryman, for section 2291 U. S. Revised Statutes is an independent legislative act by congress, donating the preference right to the patent in favor of the heirs where there is no widow, and to hold that any default or taint on the part of the original entryman could be used by a person purporting to be the widow, when she was not and *use to* the same against the heirs would be to erroneously and illegally create a class subject to the provisions and prohibitions of the act of congress against an original entryman alone contrary to the letter and spirit of said section 2291 U. S. Revised Statutes and
171 to that provision of the Federal Constitution forbidding enactment of any law working corruption of blood or Bill of Attainder.

Fourth Point.

As the fourth point, said plaintiffs in error specify that the said Oklahoma State Supreme Court in its syllabus to the opinion in the instant case held, First, "(1) That inasmuch as J (meaning defendant in error, Luttie B. Jones, the patentee,) did not assert any

right to the land as the widow of F (meaning Hollen H. Fearnow) or procure the issuance of the patent pursuant to section 2291 Revised United States Statutes the decision of the officers of the Land Department in declining to pass upon the validity of the marriage of F and J, were not erroneous, and that said decision in said particular is erroneous in this, to-wit: Upon the dismissal of the Lena Barnes contest on Nov. 26, 1906, the filing of Hollen H. Fearnow upon said premises remained intact; that two days thereafter on Nov. 28, 1906, said Luttie B. Jones claiming to be the widow of Hollen H. Fearnow and as his widow relinquishing the homestead entry of Hollen H. Fearnow upon said premises and homesteaded thereon in her own name on the same day. While it may be conceded that if she had a perfect right to file upon the land in her own name the validity of her marriage to Hollen H. Fearnow could not properly be questioned yet when it is admitted that she claiming to be the widow of Hollen H. Fearnow when she was not his widow, and acting as his widow relinquished as widow his entry upon the said premises which relinquishment and her entry had they been valid would have cut off the rights of the heirs given them under section 2291 of the Revised Statutes of the United States, it is apparent that the question of whether she was his widow or not became a very material one in determining whether or not the relinquishment which she made as such widow was valid and her subsequent entry in her own name valid. For, if her dismissal was void it was ineffective to relinquish the entry of Hollen H. Fearnow and her entry upon the premises would likewise be void, for there cannot be more than one entry upon a piece of land at one time.

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Fifth Point.

As the fifth point said plaintiffs in error specify that immediately following the portion of the syllabus to said decision quoted in the fourth point the Supreme Court of the State of Oklahoma continues to say, "That the claim of the heirs resting upon their relationship with F., they are not entitled to the relief prayed for, because they did not pursue their remedy before the land department, pursuant to section 2291, Rev. Stat. U. S.," and it is the contention of plaintiffs in error that said statement is an erroneous statement of the law as applicable to the facts in this case. Said section 2291 gives to the heirs of a deceased entryman two years in which to exercise their preference right to consummate an entry on which they shall be entitled to the patent. Hollen H. Fearnow died Oct. 23, 1905, the land department permitted Luttie B. Jones to make as his widow a relinquishment of his entry and to make homestead entry thereon in her own name under the general provisions of the homestead law on Nov. 28, 1906, less than fourteen months after the death of the homestead entryman. In two weeks thereafter the heirs instituted their contest against the said homestead entry of said Luttie B. Jones for the purpose of cancelling the relinquishment she had made of the homestead of the entryman and for the purpose of cancelling

the homestead entry she had made in her own name, and for the purpose of getting the records in the Land Office in such condition that they could exercise their right given them by said section 3291 of the Rev. Stat. to consummate their preference right of making an entry in their own name by way of proof and patent. Said above quoted portion of the syllabus to the said opinion is directly contrary to said facts as above set forth and shown by the records of this case, and contrary to the law on segregation of the public domain and entry thereof.

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Sixth Point.

As a sixth point the plaintiffs in error contend that they were entitled to the relief prayed for in their petition in the trial court for that the admitted facts disclosed that they were the only heirs of the original entryman who was deceased, and that he had no widow at the time of his death and that he had resided on the land and cultivated it for more than five years, and that under the donee provision of said section 2291 U. S. Rev. Stats. they had a vested right as the designated beneficiaries of said Act of Congress preferred over and above all other persons by Congress and not merely because they were heirs through the law on descent and distribution, and that by the unlawful and erroneous segregation of said tract from the public domain by the erroneous entries thereof by Lena Barnes and Luttie B. Jones respectively, they had been prevented from exercising their right under said act of congress through no fault of their own, but through the mistakes of law of said officials upon undisputed facts and the consequent illegal and erroneous segregation for the illegal and erroneous entries of Lena Barnes and Luttie B. Jones respectively, and we make the point that the last decision of the Oklahoma Supreme Court is contrary to the undisputed facts and the law on said segregation and prevention.

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Seventh Point.

Finally and as a seventh point we contend and urge that the Supreme Court of Oklahoma was bound by its decision made upon the first appeal in said cause whereby it settled the "law of the case," as to plaintiffs having a cause of action in equity under the admitted facts and the act of congress known as section 2291 U. S. Rev. Stats. to declare and force a trust against said Luttie B. Jones in respect to said land, that in said first decision and the proceedings upon which it was based there was before the Supreme Court of Oklahoma for its consideration the decision of Assistant Commissioner Fimple in regard to the Lena Barnes contest against the original homestead entry made by the deceased entryman, Hollen H. Fearnow, that notwithstanding the said Barnes contest and decision therein by the Register and Receiver the said State Supreme Court held that the plaintiffs had said cause of action, and specifically held that said heirs had preserved their rights by their said contest to cancel the unauthorized and void relinquishment

made by Luttie B. Jones of the original homestead entry, said relinquishment so being made by her as the widow of Hollen H. Fearnow whereas she was not his widow and by said contest also to cancel the unauthorized and void entry made by said Luttie B. Jones as an ordinary homesteader immediately after the said void relinquishment by her. That the trial court upon remand followed the "law of the case" aforesaid. That the heirs proved their case. That the defendants Luttie B. Jones and her husband, Elmer Jones, and the holder of the mortgage by them, neither plead nor proved a defense cognizable under the rules, practice and usages of courts of equity. That the trial court correctly rendered and entered a decree as prayed for in favor of said heirs and against said purported widow, then the wife of Elmer Jones, against him and the mortgage made by him and her before the issuance of the patent to Luttie B. Jones for said land, that under the admitted facts and the law the decree of the trial court was correct and that the State Supreme Court of Oklahoma erred in setting aside said decree in toto and directing and entering a converse judgment, and in so doing said State Supreme Court violated the principle of estoppel whereby it was bound by its former decision of the "law of the case" and upon the undisputed facts misapplied the law in its said last opinion and decision. Thereby depriving the said heirs of their rights under the said Act of Congress referred to as section 2291 supra contrary to the provisions of the Federal Constitution guaranteeing said rights to the said heirs then and there citizens of the United States. That the premises of this point considered the decision of the State Supreme Court of Oklahoma directing and entering said decree against said heirs should be reversed, and the decree in favor of said heirs by the District Court of Kay County, Oklahoma should be affirmed.

Designation on Printing.

And the plaintiffs in error now and here, under the provisions of section- 2 and 9 of rule 10 of the Supreme Court of the U. S. as amended May 1, 1916, now and here state that the following parts of the record filed in this court in said cause, are the parts of the record which they think necessary for the consideration of the above points, to-wit:

(First). Print beginning with page 1 of said transcript of record to the word Exhibit "A" in line 5 of page 43 of said transcript of record.

(Second). Omit printing the Exhibit "A" appearing on pages 43 and 44 of the transcript of record, and in lieu thereof print the simple statement that said exhibit "A" is the same as the exhibit "A" to the answer of Luttie B. Jones printed at a prior page of the printed record, giving such page.

(Third). Then print Exhibit "B" beginning at pages 44-45-46 and the assignment thereof appearing on said last page as Exhibit "C".

(Fourth). Next omit Exhibit "D" appearing in the last line of page 46 and on a portion of page 47 and in lieu thereof
 176 print the simple statement said Exhibit "D" is the same as Exhibit "B" for the answer of Luttie B. Jones heretofore

printed at page — of this printed record giving the page thereof
 (Fifth). Next print beginning with the words "Be it remembered" on page 47 of the transcript of record and continue on inclusively to the last page of the transcript of record.

(Sixth). Print the writ of error herein and the return thereof made to this court with the above record by Hon. Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma.

(Seventh). Print the index to said transcript of record as made and returned by the Clerk of the State Supreme Court.

(Eighth). In printing the above designated parts please or printing each and every caption and title of the cause and in lieu thereof print the simple statement "(caption and title omitted)."

(Ninth). At the proper place in the printed record print this statement of points and designation on printing, by plaintiffs in error."

Respectfully submitted,

MILTON BROWN,
 L. A. MARIS,

*Att'ys for the Plaintiffs in Error,
 Emma F. Doepel et al.*

P. O. Addresses:

Milton Brown, 809-10-11 American National Bank Bldg., Oklahoma City, Okla.

L. A. Maris, Ponca City, Kay County, Oklahoma.

July 22, 1916.

Service of the above and foregoing statement of the points on which the above named plaintiffs in error intend to rely and of the parts of the record which they think necessary for the consideration thereof, is hereby accepted, this 22nd day of July, 1916.

J. F. KING,

Att'y for the Defendants in Error, Luttie B. Jones, Elmer Jones, and The Phoenix Mutual Life Insurance Company.

P. O. Address:

J. F. King, Newkirk, Okla.

177 [Endorsed:] 571-16/25401. Original. No. 571. Supreme Court of the United States, October term 1916. Emma F. Doepel et al., pl'ffs in error, versus Luttie B. Jones et al., def'ts in error. Statement of points relied on by pl'ffs in error, and parts of the record to be printed which they think necessary for the consideration thereof, and acceptance of service. Milton Brown, Am. Nat. Bank Bldg., Oklahoma City, Okla., L. A. Maris, Ponca City, Okla., Att'ys for pl'ffs in error.

178 [Endorsed:] File No. 25,401. Supreme Court U. S., October term, 1916. Term No. 571. Emma F. Doepel et al., Plffs in Error, vs. Luttie B. Jones et al. Statement of points to be relied upon and designation by plaintiffs in error of parts of record to be printed. Filed July 28, 1916.

179 Supreme Court of the United States, October Term, 1916.

No. 571.

EMMA F. DOEPEL et al., Plaintiffs in Error,

vs.

LUTTIE B. JONES, ELMER JONES, and THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants in Error.

Designation by Luttie B. Jones, Elmer Jones, and The Phoenix Mutual Life Insurance Company upon Printing the Record in the Above-entitled Cause.

Come now the said Defendants in Error in said cause, Luttie B. Jones, Elmer Jones, and The Phoenix Mutual Life Insurance Company, by J. F. King, their attorney, and hereby designate, and request, that in addition to the parts of the record in said cause, designated and requested by Plaintiff in Error therein to be printed; that the entire case-made, filed in the Supreme Court of the State of Oklahoma, from and including the commencement thereof, to and including the Certificate thereto of the trial judge, the attestation of the Clerk, seal, and filing marks, be printed. And defendants therein, state that the same is necessary for the consideration, trial, and determination of said cause.

J. F. KING,

Attorney for Defendants in Error.

We hereby acknowledge receipt of a copy of the above designation of printing the record of the above cause this 19th day of July, 1916.

L. A. MARIS,

Attorneys for Plaintiffs in Error.

180 [Endorsed:] 571-16. File No. 25,401. Supreme Court U. S., October Term 1916. Term No. 571. Designation printing the record by Def'ts in Error.

181 [Endorsed:] File No. 25,401. Supreme Court U. S., October term, 1916. Term No. 571. Emma F. Doepel et al., Plffs in Error, vs. Luttie B. Jones et al. Designation by defendants in error of parts of record to be printed. Filed July 24, 1916.

No. 571.

EMMA F. DOEPEL et al., Plaintiffs in Error,
vs.

LUTTIE B. JONES, ELMER JONES, and PHOENIX MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendants in Error.

Designation by Luttie B. Jones, Elmer Jones, and The Phoenix Mutual Life Insurance Company upon Printing the Record in the Above-entitled Cause.

Come now the said Defendants in Error in said cause, Luttie B. Jones, Elmer Jones and Phoenix Mutual Life Insurance Company, by J. F. King, their attorney, and hereby designate and request that the entire record in said cause be printed, and defendants state that the same is necessary and material for the consideration, trial and determination of said cause.

J. F. KING,
Attorney for Defendants in Error.

We hereby acknowledge receipt of a copy of the above designation of printing the record of the above cause this 28th day of July, 1916.

MILTON BROWN,
L. A. MARIS,
Attorneys for Plaintiffs in Error.

[Endorsed:] 571-16/25,401.

183 [Endorsed:] File No. 25,401. Supreme Court U. S., October term, 1916. Term No. 571. Emma F. Doepel et al., Plaintiffs in Error, vs. Luttie B. Jones et al. Designated by defendant in error that whole record be printed. Filed August 4, 1916.

Endorsed on cover: File No. 25,401. Oklahoma Supreme Court. Term No. 571. Emma F. Doepel et al., heirs at law of Hollin N. Fearnow, deceased, plaintiffs in error, vs. Luttie B. Jones, Elmer Jones, and The Phoenix Mutual Life Insurance Company. Filed July 13, 1916. File No. 25,401.

Office Supreme Court, U. S.

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916

Emma F. Doepel et al., heirs at law of
Huden H. Fearnow, deceased,
Plaintiffs in Error,

vs.

Luttie B. Jones, Elmer Jones, and the
Phoenix Mutual Life Insurance Company,
Defendants in Error.

No. 571

In Error to the Supreme Court of the State of Oklahoma

**ADDITIONAL BRIEF BY PLAINTIFFS IN ERROR
ON THE MERITS**

MILTON BROWN,
Am. Nat. Bank Bldg, Oklahoma City, Oklahoma.
Solicitor and Attorney for Said Plaintiffs in Error.

L. A. MARIS,
Ponce City, Oklahoma.

CODY FOWLER,
Am. Nat. Bank Bldg., Oklahoma City, Oklahoma.
Of Counsel for Said Plaintiffs in Error.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916

Emma F. Doepel et al., heirs at law of
Hollen H. Fearnow, deceased,
Plaintiffs in Error,

vs.

Luttie B. Jones, Elmer Jones, and the
Phoenix Mutual Life Insurance Company,
Defendants in Error.

No. 571

In Error to the Supreme Court of the State of Oklahoma

ADDITIONAL BRIEF BY PLAINTIFFS IN ERROR
ON THE MERITS

May it please the Court:

As an additional brief and argument on the merits herein by the plaintiffs in error, they make the following Statement of the Case:

On April 20, 1909, the plaintiffs in error in this Court,

as plaintiffs in the trial court, the District Court in and for Kay County, State of Oklahoma, begun their action against the defendants in error herein by filing their petition therein and causing the proper process to be issued and served on said defendants in error, defendants in said trial court. The cause of action there was and is one for a declaration and decree that one Luttie B. Jones held and holds the legal title to the lands hereinafter described in trust for the said plaintiffs and one R. C. Fearnow named therein, as the beneficiaries of the Act of Congress known as Sections 2291 and 2292 of the Revised Statutes of the United States, by reason of the fact that they were the only heirs at law of one Hollen H. Fearnow, deceased, which decedent died intestate and unmarried without having made final proof to a Homestead Entry made by him at the U. S. Land Office at Guthrie, Oklahoma; said entry having been made on March 29, 1889, and said death occurring on October 23, 1905. Said land being described as the southwest quarter of section eleven, township twenty-six North of Range one East, of the Indian Meridian in Kay County, Oklahoma. That said Hollen immediately after making said entry took possession of said land resided thereon and cultivated and made lasting and valuable improvements thereon from thence until the day of his death on October 23, 1905, and that he died without said Hollen and one Luttie B. Fearnow, at Wichita, State of Kansas, went through a pretended marriage ceremony, at which time both were residents of Oklahoma; that said Hollen and Luttie were first cousins by blood, their respective fathers being full brothers; that both the laws of Kansas and Oklahoma at that time, and at the time of the bringing of said action, provided and declared such marriages to be absolutely void and incestuous, and specifically plead said Kansas statute; that in May, 1903, one Lena Barnes filed a contest against said Hollen and his said Homestead Entry in said U. S. Land Office; that at the time of his death the contest was still upon the dockets of said U. S. Land Office, although the Hon. J. H. Fimple, Assistant Commissioner of

the General Land Office of the United States, had on January 20, 1905, made the following order in respect to said contest then before upon the appeal of said Hollen: "I have therefore, this day, set aside all the proceedings had before you in the premises, and you are hereby directed to appoint a day for the hearing of this contest, of which both parties shall have at least 30 days' notice. Upon the final determination of the case, should plaintiff (Lena Barnes) be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690, which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. No. 10171 reinstated. Advise the parties in interest hereof and plaintiff of her right of appeal, and in due season report all action taken in the premises." Explanatory of the two H. E. above mentioned it is proper to state the No. 10171 was that of said Hollen and No. 13690 that of said Lena Barnes, which latter entry Judge Fimple held in said Asst. Comr. Decision to have been erroneously allowed and made. No appeal was taken by Barnes to the Secretary of the Interior, nor did Lena Barnes after the contest was remanded to the Local U. S. Land Office revive the contest in any manner against the heirs of Hollen H. Fearnow, deceased. The local officers of said U. S. Land office never did a thing until November 26, 1906; when they accepted from said Lena Barnes a formal dismissal of her contest and a formal relinquishment of said Lena Barnes suspended entry aforesaid, at which time automatically under said decision of Judge Fimple and the law, said Hollen's entry became reinstated; afterward, on November 28, 1906, said Luttie, claiming to be the widow of Hollen H. Fearnow, deceased, appeared at said Local Land Office and falsely claiming that she was the widow of said Hollen, filed her relinquishment of said Hollen's entry as his widow, and simultaneously was permitted to make a Homestead Entry of said land, not as widow, but as a qualified homesteader, under Section 2289 et seq; her entry being given the No. 14423 (Serial 0240).

In two weeks after Luttie B. Fearnow had made her entry as above stated, to-wit, December 12, 1906, Emma F.

Doepel and the other heirs at law of said Hollen, deceased (including the mother, who was then alive, but since deceased), for themselves and for said R. C. Fearnow, filed their contest affidavit in said Local U. S. Land Office against said Luttie, attacking the relinquishment made by Luttie of Hollen's entry, as aforesaid as void on the ground that Luttie was not his widow, asking that Luttie's entry be cancelled; that the pretended relinquishment aforesaid be set aside; that the entry made by Hollen be reinstated, and they be allowed (as the sole heirs of said deceased, Hollen) to make Final Proof; and to receive patent from the United States for said land. In said contest affidavit there was a proffer to prove the allegation that the pretended or purported marriage was illegal, incestuous, and void under the laws of both Kansas and Oklahoma and also averring that the possession of said Luttie of said land was against their rights and claims as the only lawful heirs of said Hollen, deceased. The said Local Office rejected said contest and denied the heirs a hearing on the sole ground "that no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department could not question the validity of the marriage on the contest filed." From this decision the heirs appealed to the Commissioner; and on May 13, 1907, Commissioner Ballinger affirmed the Local Office in its said ruling. From Commissioner Ballinger's decision the heirs appealed to the Secretary of the Interior who, on September 1, 1907, affirmed Commissioner Ballinger's decision. Meanwhile Luttie married said Elmer Jones, on August 1, 1908, after Luttie had proved up on July 22, 1908. Said Elmer Jones and Luttie B. Jones, his wife, borrowed \$3,000.00 on August 1, 1908, from one P. H. Albright, to secure which loan a note was given said Albright of said date by said Jones and his wife, together with a mortgage on said land, executed by said Elmer Jones and his said wife, the said Luttie, which was acknowledged by them on August 1, 1908, and recorded on that date in the office of the Register of Deeds of Kay County, Oklahoma; afterward, on September 1, 1908, said Albright sold, as-

signed, transferred, and conveyed said mortgage to the defendant in error, The Phoenix Mutual Life Insurance Company, which assignment was similarly made a matter of record in said Kay County on September 4, 1908; AFTERWARD ON THE 15th day of MARCH, A. D. 1909, the President of the United States issued the Patent for said land to Luttie B. Jones, her heirs and assigns in consummation of her Homestead Entry No. 14423, and the same was recorded in said office of said Register of Deeds ON APRIL 6, 1909; thereafter, on April 20th, 1909, said heirs begun their action to declare and decree said trust as first herein stated.

Upon the first hearing in the trial court which was upon demurrer to the said heirs' petition, the trial court sustained a demurrer to said petition by the defendants; from that decision a proceeding in error was prosecuted by the heirs to the Supreme Court of Oklahoma, and on August 8, 1912 the trial court was reversed and the cause remanded by said Supreme Court; see *Doepel et al. v. Jones et al.*, 34 Okl. Rep. 694.

After the remand the cause was put at issue in the trial court by the filing of various answers, motions and replies, and the action tried before the Hon. William M. Bowles, District Judge, presiding in said District Court upon the pleadings and exhibits thereof embracing copies of said contests and the various decisions by local officers, Commissioner and Assistant Commissioner and Assistant Secretary of the Interior, and a stipulation to be "considered in connection with the pleading in the case"; none of the said exhibits were denied under oath by either of the defendants; the trial was had on April 21, 1913, resulting in a judgment and decree in favor of the said heirs "that they were the sole and only heirs of Hollen H. Fearnow, deceased, the homestead entryman mentioned in plaintiffs' petition, that they and the said R. C. Fearnow are the owners in fee-simple of said land (describing it as above), and adjudging and decreeing and ordering the said Luttie B. Jones and her said husband, Elmer Jones, shall make a good and sufficient

DEED conveying said premises to said owners thereof; and similarly adjudging and decreeing that the above mortgage did not constitute any lien or incumbrance on said land and that it be cancelled, set aside and held for naught," with a judgment for costs against the said defendants.

From the above judgment and decree said Luttie B. Jones and Elmer Jones, as plaintiffs in error, prosecuted error to the Supreme Court of the State of Oklahoma, making as defendants in error said heirs and the said Insurance Company, holder of said mortgage *given before issuance of Patent from the United States*, said decree being rendered on September 1, 1913.

On January 10, 1914, said Luttie B. Jones and Elmer Jones filed her petition in error in the Supreme Court of the State of Oklahoma to review said judgment and decree against them and against the said Life Insurance Company, and on the same day the said Insurance Company, holder of said mortgage, filed therein its cross petition in error, seeking to reverse the judgment and decree rendered against it as aforesaid.

In due course on February 2, 1916, after said cause had been briefed and submitted in and to said State Supreme Court by the parties to said case, the said State Supreme Court handed down its opinion reversing the said decree of the District Court of Kay County, Oklahoma in *toto* and entering a judgment in favor of Luttie B. Jones.

The following is a full and complete copy of said opinion, to-wit:

"Supreme Court, January Term, 1916, February 8th, 1916,
Thirteenth Judicial Day. 5978.

"Luttie B. Jones et al. vs. Emily F. Fearnow et al.

"And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

"And the court having considered the same, finds that

the judgment of the trial court in the above cause should be reversed and the cause remanded.

"It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded, with directions to set aside the decree in *toto* and to enter a judgment in favor of the defendant Luttie B. Jones. Opinion by Kane, C. J. All the Justices concur. (87)

"Feb. 8th, 1916.

"(Filed Feb. 8, 1916. William M. Franklin, Clerk.)

"In the Supreme Court of the State of Oklahoma. No. 5978.

"Luttie B. Jones and Elmer Jones, Plaintiffs in Error, vs. Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow, as next friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner Cecil Turner and Richard T. Fearnow, infants, the Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

"1. The United States Land Department primarily is entrusted with the disposal of the public domain, and the action of its officers will not be inquired into in the courts, unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they, themselves, were chargeable with fraudulent practices, and that as a result thereof the patent was issued to the wrong party.

"2. F. filed a homestead entry upon a tract of unoccupied public land and died before making his final proof. Thereafter J., a qualified homestead entryman, in her own right, presented to the proper officers of the land department a relinquishment of said entry and an application to enter said land, which were accepted, and her homestead entry placed of record. Thereafter the heirs of F. filed a contest against the homestead entry of J., wherein they al-

leged that her homestead entry was void, on account of certain alleged false statements of said entryman to the effect that she was the wife of F., the original entryman, which contest was rejected, the officers of the local land office and the Commissioner of the General Land Office holding that no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department could not question the validity of the marriage, the Secretary of the Interior further holding: (1) That this is a question the department cannot decide from the record before it; (2) that independent of this, the contestants presented no ground upon which their contest can be sustained; and (3) that their delay in proceeding to contest, pursuant to Section 2291, Rev. Stat. U. S. (Comp. 1901, p. 1390) is a sufficient reason for rejecting their contest. Thereafter J. submitted her final proof before the land department, whereupon a patent to said land in due form was issued to her by the United States. Thereafter in a suit in equity commenced by the heirs of F. against J. for the purpose of declaring a resulting trust upon the ground, "That the Department of the Interior committed error in said decisions and all of them in refusing to permit these plaintiffs (the heirs of F.) to show that said Luttie B. Jones, then Fearnow (J.), the defendant herein, was not the wife of the said Hollen H. Fearnow (F.), deceased "(88), the foregoing facts were agreed upon by the parties; Held: (1) That inasmuch as J. did not assert any right to the land as the widow of F., or procure the issuance of the patent pursuant to section 2291, Rev. Stat. U. S., the decisions of the officers of the land department in declining to pass upon the validity of the marriage of F. and J., were not erroneous; (2) That the claim of the heirs resting upon their relationship with E., they are not entitled to the relief prayed for, because they did not pursue their remedy before the land department, pursuant to section 2291, Rev. Stat. U. S.; (3) That, granting the heirs can make their final proof and present the affidavits, etc., required by section 2291 before the court, then the agreement of the parties as to the speculative nature of the home-

stead entry of F. should also be considered, and in that event they would be no better off; (4) that the heirs of F. are not entitled to the relief prayed for upon any theory which may be properly predicated upon the record and agreed statement of facts before us.

“(Syllabus by the Court.)

“Error from the District Court of Kay County

“Hon. Wm. M. Bowles, Judge.

“Reversed and Remanded With Directions.

“J. F. King, for plaintiff in error and cross petitioner, The Phoenix Mutual Life Insurance Company; W. P. Hackney and J. T. Lafferty (both of Winfield, Kas.), of counsel for cross petitioner.

“L. A. Maris, for defendants in error other than The Phoenix Mutual Life Insurance Company; William H. England, of counsel.

“Opinion of the court by Kane, C. J.:

“This was a suit in equity, commenced by all of the defendants in error, plaintiffs below, except the Phoenix Mutual Life Insurance Company, a corporation, against the plaintiffs in error, defendants below, for the purpose of declaring a resulting trust. The defendant in error, The Phoenix Mutual Life Insurance Company, was the holder of a mortgage on the land involved, executed by the plaintiff in error, Luttie B. Jones, and was joined with her as a party defendant in the trial court (89).

“This is the third time the cause has been before this Court, one phase of it having been considered in Fearnow vs. Jones, 34 Okl. 694, upon a former appeal, and another, upon a motion to dismiss the present proceeding in error (Luttie B. Jones et al vs. Emily F. Fearnow et al., not yet officially reported, 149 Pac. 1138). After the cause was remanded to the trial court upon the former appeal, it was tried upon certain documentary testimony and an agreed statement of facts, after the consideration of which, the trial court entered a decree in favor of the plaintiffs as prayed for, and further held that the mortgage held by the Phoenix Mutual Life In-

surance Company 'does not constitute any lien or incumbrance upon said premises and that said mortgage be cancelled, set aside and held for naught.'

"For the purpose of reviewing this latter decree of the trial court the defendants in error, Luttie B. Jones and Elmer Jones, commenced this proceeding in error, joining therein as defendants in error, the Phoenix Mutual Life Insurance Company, who filed a cross petition in error for the purpose of reviewing the part of the decree which affects its interests.

"In our opinion, the decree rendered by the trial court is erroneous in its entirety. The tract of land involved was originally entered under the homestead laws of the United States by Hollen H. Fearnow on the 29th day of March, 1899, who immediately upon the filing of said entry, went into possession thereof and cultivated and improved the same as his homestead until the date of his death, which occurred on the 6th day of October, 1905; that for a considerable portion of the time he thus resided upon the land he and the defendant, Luttie B. Jones lived together as husband and wife.

"From an examination of the opinion formerly handed down it will appear that the decision of the court turned on the question, whether the land department erred in declining to inquire into the validity of the marriage of the entryman Fearnow, and the defendant, Luttie B. Jones, in a certain contest proceeding instituted against her by his heirs. The question arose upon a demurrer to the petition, which was sustained by the trial court, and overruled on appeal (90).

"As we view the case as it is now more fully presented upon the record and agreed statement of facts, the question of whether the original entryman and the defendant Luttie B. Jones, nee Fearnow, were legally married is in no manner material to a determination of this case. The agreed statement of facts, insofar as it is necessary to advert to it, shows that after the death of the entryman, Hollen H. Fear-

now, the defendant continued to reside and make her home upon the land as she had formerly done; that on the 28th day of November, 1906, she presented to the proper officers of the land office at Guthrie, Oklahoma, a relinquishment of the land and an application to enter the same as a homestead in her own name, which relinquishment and application were accepted and her homestead entry No. 14423 entered of record. That at said time she was an unmarried female over the age of twenty-one years, a native-born citizen of the United States, and in every respect entitled to make a homestead entry upon public lands under the homestead laws of the United States. That after making said homestead entry she continued to reside upon and cultivate and improve said land and in due time paid the purchase price and finally 'proved up' the same under the homestead laws of the United States, whereupon a patent was issued to her, wherein the foregoing facts and her compliance with the homestead laws are fully recited. That on the 12th day of December, 1906, prior to the issuance of the patent, the plaintiffs herein filed their contest affidavit against said entry of said Luttie B. Jones, then Luttie B. Fearnow; that on the 5th day of January, 1907, the United States land office at Guthrie rejected said contest affidavit as insufficient and rendered a decision in favor of the contestee. That said contestants appealed from said decision to the Commissioner of the General Land Office and the said Commissioner, on May 13, 1907, affirmed the said decision of the Land Office; that thereafter the said contestant appealed from the decision of the Land Office to the Secretary of the Interior and on the 1st day of September, 1907, the Secretary of the Interior affirmed the decision of the Land Office. Thus matters rested until patent was issued to the defendant Luttie B. Jones, when, some considerable time after the issuance of patent, this suit was commenced to declare a resulting trust (91).

"In view of the conclusion we have reached, it will not be necessary to state in detail the facts in connection with the mortgage held by the defendant, the Phoenix Mutual Life Insurance Company, or notice their contentions in relation

thereto, as there appears to be no controversy between it and the defendant Luttie B. Jones. If in the consideration of the case before us, we start with a correct premise we think there will be no difficulty in demonstrating the correctness of the conclusion hereinbefore indicated. It is well settled that the United States Land Department primarily is entrusted with the disposal of the public domain, and that the action of its officers will not be inquired into in the courts, unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they, themselves, were chargeable with fraudulent practices, and that as a result thereof the patent was issued to the wrong party. *Ross v. Stewart*, 25 Okl. 611; *Fast v. Walcott*, 38 Okl. 715. This principle is recognized as correct by all the parties to this controversy, the plaintiffs contending that they are entitled to relief on account of material errors of law committed by the officers of the land department in a contest proceeding between the heirs and the defendant, and as a result thereof the patent to the land involved herein was issued to the defendant, whereas, it should have been issued to the plaintiffs as heirs of the original entryman, Hollen H. Fearnow. It becomes necessary, therefore, to inquire what error of law, if any, did the officers of the land department commit? In the contest affidavit filed before the land office the contestants alleged that the homestead entry of Luttie B. Fearnow was null and void, for the reason that her pretended marriage with Hollen H. Fearnow was invalid. The register and receiver of the local land office and the Commissioner of the General Land Office held in effect that no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department would not question the validity of the marriage upon the protest filed. This is the specific error of law which the plaintiffs allege the officers of the land department committed (92). The Secretary of the Interior, however, rejected the contest upon two additional grounds, the correctness of which were not ques-

tioned by the heirs in their petition, but which will be noticed by us later in connection with another phase of the case.

“As the facts were stated in the petition and admitted by the demurrer filed thereto, this Court formerly held that the land department erred in declining to inquire into the validity of the marriage of the original entryman and Luttie B. Fearnow. An examination of the opinion then rendered will disclose that this conclusion was based upon the assumption that the defendant procured the issuance of her patent under section 2291, Rev. Stat. U. S. However, upon the fuller statement of facts contained in the record and in the agreed statement of facts now before us, we are convinced that the decision of the Secretary of the Interior rejecting the contest of the plaintiffs was correct in every particular. As the case now stands, it is conceded that Luttie B. Fearnow, at the time she made her homestead entry, was a qualified homestead entryman, and that she presented her relinquishment and application to file upon this land as such entryman, and that her application was accepted and filed of record as one entitled to make such entry in her own right. It is proper to say at this point that whilst the record and agreed statement of facts now before us is sufficiently full and clear to disclose the immateriality of the marital relations of Hollen H. and Luttie Fearnow, it is quite deficient when it attempts to disclose the exact facts immediately surrounding the acceptance by the land department of the relinquishment and the application to make homestead entry presented by Luttie B. Fearnow. Neither the relinquishment nor the application to enter said land presented by Luttie B. Fearnow are contained in the record before us, and, although plaintiffs allege in their petition “that at the time of the filing of said relinquishment and the said homestead entry * * * she claimed to be the widow of Hollen H. Fearnow, deceased, the allegation is not covered by any evidence in the record or admission in the agreed statement of facts (93). It is clear, therefore, that even now we are not favored by all the facts which the officers of the land department had before them and, no doubt, considered in al-

lowing the defendant to file upon the land. In the absence of proof to the contrary, it will be fair to assume that the relinquishment and the application presented by Luttie Fearnow were in the usual form, and contained no false statements as to her marital relations with the former entryman. At any rate, no such statement was material to any right she was then seeking to assert, and if she made any such statements to the land officers at that time, there is nothing in the record to indicate that they were misled by them, or that they in any way influenced their action accepting the relinquishment and application to make a homestead entry in her own name. Conceding, then, as the court has held, that in a proper case, the land department would be required to inquire into the validity of the marriage of parties similarly situated, it is quite apparent to us that in the case before us, no such inquiry was necessary, for the simple and sufficient reason that Luttie Fearnow claimed, and acquired, no right by virtue of any relationship with the former homestead entryman, Hollen H. Fearnow, but, on the contrary, her right to the land was based entirely upon a homestead entry made by herself as a qualified entryman under the homestead laws. As it is shown by the contest affidavit filed before the land department, the decisions of the various officers thereof, and the former opinion of this Court, that the only vice ever urged against the homestead entry of Luttie B. Fearnow was, that at the time she made the same she wrongfully claimed to be the wife of Hollen H. Fearnow, we might rest here, but, inasmuch as the heirs have succeeded in successfully maintaining what seems to us a wholly untenable position, we deem it advisable to notice a few other phases of the case (94). One of the other features of the case worthy of notice is that in addition to the findings of the officers of the local land office and the Commissioner of the General Land Office to the effect that the validity of the marriage of the defendant Luttie B. Fearnow was not a proper subject for consideration in the contest proceedings, the Secretary of the Interior, in his decision, based his conclusion upon two additional grounds. Speaking of the legal status of the contestants he says.

“ ‘Contestants have presented no grounds upon which the contest can be sustained. They do not allege a priority of right to make entry, or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow, it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right, it would be necessary to re-instate that entry and to show that it was improperly cancelled, not by reason of any technical objection in the procedure, but upon its merits. Furthermore, their delay in presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry.’ ”

“ ‘This seems to us to be a correct statement of the law. Section 2291 of the Revised Statutes (U. S. Comp. Stat. 1901 p. 1390), providing for the disposition of a homestead entryman’s rights upon his death, is as follows:

“ ‘No certificate, however, shall be given or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proved by two credible witnesses that, he, she or they have resided upon or cultivated the same for a term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.’ ”

“ ‘Now, it is entirely clear that neither of the parties to this controversy attempted to avail themselves of the remedy provided by the foregoing section of the Revised Statutes. As we have already seen, the defendant Luttie B. Fearnow,

instead of claiming any right in the land by virtue of being the widow of the original entryman, made application for the land in her own right, entered the same and proved it up, paying the purchase price, not as the widow of the original entryman, but as a qualified homestead entryman. On the other hand, the heirs resting their claim upon their relationship to the original entryman were bound to proceed in accordance with the foregoing statute, but instead of doing so, they filed a contest against the homestead entry of the defendant, wherein they seek to cancel the homestead entry of Luttie B. Fearnow upon the sole ground that at the time she made said homestead entry, she claimed to be the wife of Hollen H. Fearnow, deceased. In view of the facts that she was claiming no right to the land by reason of any relationship existing between herself and the original entryman, we are unable to see the materiality of such a claim or how it would affect the result of this suit, even if it were conceded she made it. If Luttie B. Fearnow had rested her claim upon her relationship to Hollen H. Fearnow, the original entryman, she would have been required to proceed in accordance with section 2291, *supra*, of the Revised Statute; but instead of doing this, as she had a perfect right to do, she elected to file a homestead entry of her own and prove up the land in her own name. The heirs, instead of pursuing their remedy under section 2291, *supra*, attempted to follow their procedure for which there is no warrant in the law, so far as we are informed. By further reference to this section it will be seen that the proof required by section 2291 must be made within two years after the entryman or his heirs have earned the land by residence, improvement, etc. In such circumstances we fully agree with the conclusion reached by the Secretary of the Interior that in the contest case the 'contestants have presented no grounds upon which their contest can be sustained,' and that 'their delay in not presenting their claim (in the manner provided by section 2291), even if valid, is a sufficient reason for rejecting their claim to contest this entry.'

"If we examine the case from still another viewpoint, the

same conclusion must be reached. One of the defenses set up in the answer of the defendant herein was that Hollen H. Fearnow, the original entryman, did not enter the land in good faith, but for speculative purposes. Responsive to the issue thus raised, the agreed statement of facts states in effect that about three or four days prior to filing his homestead entry Hollen H. Fearnow, the entryman, entered into a verbal contract with his mother, Emily F. Fearnow, by the terms of which Hollen H. Fearnow for a valuable consideration agreed to enter said tract of land as a homestead in his own name, prove up, under the homestead laws, and after procuring a patent to the land, make a conveyance of the same to his mother. To avoid consideration of these facts counsel for plaintiff say in their brief:

“ ‘All questions of fact must in their inception be raised in the land department and if they have not been raised there the courts are without jurisdiction to consider them. The land department is invested with sole authority at law to determine questions of fact. The court was without jurisdiction to hear or in any way consider such matters except the party has presented them or offered to present them to the land department. The United States Constitution and statutes are conclusive upon this question.

“ ‘ ‘The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.’ United States Const. Art. IV, section 3, Cl. 2.

“ ‘Under the authority of this section congress has conferred jurisdiction upon the commissioner of the general land office, under the direction of the Secretary of the Interior, to supervise the disposition of the public lands.’

“ ‘In considering this phase of the case, let us assume that this is a correct statement of the law and follow the premise of counsel to its inevitable conclusion. It is conceded that the heirs base their right to the land upon their relationship with the original entryman, Hollen H. Fearnow.

Keeping this concession in mind, let us now inquire what it was necessary for them to do in order to acquire title from the United States? To this we must again revert to section 2291 of the Revised Statutes of the United States. We find that before patent could be issued to the heirs, it was incumbent upon them to prove by two credible witnesses that either the entryman or they have resided upon or cultivated the land for a term of five years immediately succeeding the entry, and make affidavit that no part of such land has been alienated, except as provided in section 2289, and that they will bear true allegiance to the government of the United States. Then, in such case, the statute further provides, if at that time they are citizens of the United States, they shall be entitled to a patent as in other cases provided by law (97). It must be conceded of course, that all the proof, affidavits, etc., required by the statute must be presented before the proper officers of the land department before any one claiming thereunder would be entitled to a patent. It is obvious, then, that the heirs, not having submitted their final proof before the land department, it will be necessary for them to do so before the court, before they would be entitled to have a resulting trust decreed in their favor, and that this cannot be done if, as their counsel contend, 'All questions of fact must in their inception be raised in the land department, if they have not been raised there, the courts are without jurisdiction to consider them.' It does not seem to us to be necessary to pursue this line of inquiry much farther. If this premise of counsel for the plaintiffs is conceded, it but leads them up to an insuperable barrier against recovery. On the other hand, if we assume that counsel were in error in their premise, and that final proof on behalf of the heirs may be made before the court, it would seem to follow that the agreed facts in relation to the good faith of the original entryman ought also to be admissible, and in that event the heirs would be placed in no better situation.

"It seems to be well settled that the rights of those claiming public lands must be determined by the validity of the original entry. 32 Cyc. 806; *Watts v. Amos*, 14 Okl. 178; *Gallihier v. Caldwell*, 18 Pac. 68.

“Indeed, the homestead entry of Hollen H. Fearnow had formerly been cancelled by the land department upon the identical facts agreed upon by the parties herein in a contest proceeding instituted against him by one Lena Barnes, who was permitted to file upon the land in her own name. Her entry, however, was suspended by the Commissioner of the General Land Office for some defect in the notice of contest and she dismissed her contest case at the time the defendant herein filed the relinquishment and made entry. This ground of contest was well known to the defendant herein, and she would have been entitled to avail herself of it as against the heirs if they had attempted to make final proof before the land department as required by section 2291, *supra* (91). Admittedly she was a qualified entryman subsequent to the death of the original entryman, whether she was legally married to him or not, and she, or any other qualified homestead entryman, or indeed, anyone knowing the facts could, in behalf of the government, interpose this barrier as against anyone resting their right to the land upon the speculative entry of Hollen H. Fearnow. If the equitable remedy the heirs are now invoking was available to them, and the foregoing contention of their counsel was correct, it would be a shrewd move on their part if not quite honest, to avoid submitting their final proof before the land department, pursuant to section 2291, *supra*, which procedure obviously would be beset by many perils and difficulties, and wait until the defendant had entered the land, earned it by residence, improvements, payment of purchase price, etc., made final proof and secured her patent, and then make final proof before the court, where all such troublesome pitfalls would be avoided.

“As, in our judgment, the heirs would not be entitled to the relief prayed for upon any theory which may be properly predicated upon the record and the agreed statement of facts, the judgment of the court below is reversed and the cause remanded with directions to set aside the decree in *toto*, and enter a judgment in favor of the defendant, Luttie B. Jones.

“All the Justices concur.”

In due time said heirs served and filed their petition for rehearing in said State Supreme Court on the following grounds:

“I. That said State Supreme Court, speaking through Judge Ames in 34 Okl. 694, held that upon the facts stated in the petition Luttie B. Jones never was the wife of Hollen H. Fearnow and had no right to relinquish said Hollen’s entry as his widow and that she had no right to make an entry of said land to the prejudice of the rights of his heirs as preferred successors to him under Sections 2291 and 2292 of the Revised Stats. U. S., and that in its last decision said State Supreme Court had overlooked said decision.

“II. That it had overlooked a stipulation in the agreed statement of certain facts, i. e. the agreement that Luttie B. aforesaid on Nov. 28 1906, as widow of Hollen B. Fearnow and claiming to be such widow, relinquished said Hollen H. Fearnow entry.

“III. That said State Supreme Court had overlooked an interlocutory order made by it in said cause holding that said trial did not occur on the agreed statement alone but upon other evidence—meaning the transcripts of the official decisions in the land department made exhibits of the pleadings and other documents made as such exhibits. 149 Pacific Rep. 1138.

IV. That it had overlooked the undisputed record facts that the said heirs were prevented from asserting their rights under Sections 2291 and 2292, U. S. Rev. Stats., by the erroneous acts of the officers of the Local U. S. L. O., and the actions of said Luttie in effecting an apparent segregation of said tract immediately after the cancellation of the Barnes erroneous entry and dismissal of the Barnes case, by further erroneous relinquishment by Luttie as widow—when she was not—and simultaneous entry of the tract under another section of the U. S. Rev. Stats. than 2291 and 2292, thus forcing the heirs to con-

test said Luttie's relinquishment and her contemporaneous entry; and that Assistant Secretary of the Interior Jesse Wilson had likewise overlooked said facts, errors and law applicable thereto whereby the heirs were prevented illegally from making their entry under said Sections 2291 and 2292, U. S. Rev. Stats., and that before they could make their entry they necessarily were forced to bring a contest (as they did) to clear said records of said fraudulent and void relinquishment and entry by Luttie B., aforesaid. And in so doing had overlooked said sections, U. S. Stats, supra, as well as *McMichael v. Murphey*, 197 U. S. 304.

"V. That the State Supreme Court erred in holding 'that Luttie B. was entitled or would have been entitled to avail herself as against the heirs as a ground of contest of it' (meaning the exploded charge of speculation between Hollen and his mother referred to in the defunct Barnes contest) 'if they, the heirs, had attempted to make final proof,' and overlooked that their decision in that respect was contrary to a long line of decisions by the Land Department and by this and other Federal Courts; viz., 1 L. D. 55, *In re White*; *Dorame Heirs v. Towers*, v Copp's Pub. Land Laws, vol. 1, pages 438 *et seq*; 32 L. D. 653, § 4, *Stevenson's Heirs v. Cunningham*; *Howe v. Parker*, 190 Fed. 755-757, and cases therein cited.

"VI. That said State Supreme Court had overlooked the fact of record before it, whereby it appeared that the Lena Barnes contest and her entry thereunder had been cleared of record by the decision of Assistant Commissioner J. H. Fimple on the ground that the local office had no jurisdiction and that Hollen H. had made a showing in that appeal before Fimple of a good and sufficient defense against the charges made by Lena Barnes, after which said Barnes relinquished her entry and dismissed her contest in close proximity to the time of the actions of said Luttie and said local land office in making another segregation, as above stated herein.

“VII. That said State Supreme Court overlooked the fact that the said land office and Land Department in their proceedings in the contest brought by the heirs against said Luttie, upon the facts admitted by Luttie’s motion to dismiss same (thereby admitting same), erred **IN DENYING THE HEIRS A HEARING** to prove her disqualification and that she was not his widow, and to prove that the said heirs, under the undisputable facts and the law, were entitled to have said relinquishment set aside, said Luttie B.’s entry cancelled, and to in due course perfect their entry to said land as the sole heirs, under the provision of the law governing same (Secs. 2291-2292, supra).

“VIII. That the Secretary of the Interior erred in not ordering a hearing in the contest by the heirs against the pretended widow.

“IX. That the U. S. Land Office and the Land Department— Commissioner General L. O. and Secretary of the Interior each and all erred in denying said heirs a hearing, thereby depriving said heirs of their rights under Sections 2291 and 2292 aforesaid, without due process of law and in violation of the provisions of the Federal Constitution guaranteeing due process of law and prohibiting any of the Federal governmental departments from depriving any of its citizens of their property rights and rights under the said Constitution and the amendments thereto, as well as the acts of Congress of the United States, without due process of law.

“X. That said Supreme Court had overlooked that under its decision in 34 Okl. 694, it had decided that the validity of the purported marriage between Hollen and Luttie was a question properly before the Land Office and the Land Department and that they had erred as a matter of law in denying the heirs a hearing thereon, and thereby denied them a hearing, wherein Judge Ames, speaking for the court, said. ‘The Land Office has declined to make inquiry into the fact (illegality and voidness of the pur-

ported marriage) AND IF THE COURTS SHOULD LIKEWISE REFUSE, THEN THE HEIRS who are entitled to the estate, would be deprived of it, *without having their day in court.*'

"XI. That said Supreme Court had overlooked that under said prior decision it had settled the law of the case as stated in the second syllabi 'the heirs have properly preserved their rights before the Land Office, and where it is alleged that the marriage is a nullity and that, therefore, the person claiming the land is not the widow of the entryman, the nullity of the marriage may be asserted.'

"XII. That said State Supreme Court in its last opinion overlooked the undisputed fact that Luttie had perpetrated a fraud on the Land Office and the Land Department by her false representation that she was the widow and thereby had the right to relinquish Hollen's entry and when she thus procured them to permit her to relinquish it, then to make an entry in her own name, thus segregating the tract entirely from the Hollen entry and thereby preventing the heirs from doing anything other than to bring the contest they did to clear the record of said fraudulent relinquishment and contemporaneous Luttie entry.

"XIII. That the said State Supreme Court overlooked the law as decided by this court in 173 U. S. 587, *Duluth, &c., Ry. Co. v. Roy*, on the law that the heirs herein had been prevented by the acts of said Luttie and the errors of law of the land office officials from Register and Receiver to Hon. Secretary of the Interior, inclusively, upon undisputed facts, and hence the period of said prevention should not work against the heirs where they had taken the steps admitted by the record to have been taken by them.

"XIV. That said State Supreme Court had overlooked the law in regard to the once mooted question—

afterwards found by Commissioner Fimple as *nil*—‘speculativeness,’ as to its futility in an attack on the rights of the beneficiaries of the Act of Congress referred to herein as Sections 2291 and 2292, U. S. Rev. Stats., as construed by the Land Department and the Federal Courts, including the United States Supreme Court, to-wit: *nil*.

“XV. That the said State Supreme Court overlooked it that the judgment it directed to be entered against the said heirs deprived them of their right under said Act of Congress contrary to the provisions of Article 1, Section 10, Federal Constitution in substance that neither by legislation or by exercise of an authority under legislative act shall any bill of attainder be passed or enforced.

“XVI. That said State Supreme Court overlooked the law as determined by the U. S. Court of Appeals for the Eighth Circuit in *Howe v. Parker* on the grant involved as an independent grant to the heirs because Congress saw fit to do so by its Act—Sections 2291 and 2292, U. S. Rev. Stats.

“XVII. That the said State Supreme Court had overlooked the fact and the law that at the time said Luttie fraudulently relinquished the Hollen H. Fearnow entry it was intact of record and no charges whatever pending against it, for only two days elapsed from the time the Barnes contest and entry had been cleared of record before the fraudulent relinquishment and erroneous and void actions by Luttie were erroneously permitted by said local officers.

“XVIII. That said State Supreme Court had overlooked that the Barnes contest had never been revived against said heirs at any time after Hollen’s death and that said heirs were never notified of the actions by either Barnes, Luttie or the Local Office after the relinquishment and dismissal by Barnes.

“XIX. That said State Supreme Court had overlooked it that upon the undisputed facts said Hollen entry

being illegally and fraudulently relinquished, it followed as a matter of law that in law the Hollen entry was yet intact, although it took a contest to clear the records of the relinquishment and void entry by Luttie, as decided upon principle by this court in *McMichael v. Murphey* in affirming 12 Okl. 155; see *McMichael v. Murphey*, 197 U. S. 304.

“XX. That the said State Supreme Court, as the highest court in the state, had, by its decision in reversing the trial court’s judgment and decree in favor of said heirs and in directing a judgment and decree against them in favor of said pretended widow, had upon the undisputed facts before it erred in not affirming the trial court’s decree, and that thereby upon the undisputed facts aforesaid said decision of Supreme Court of the said state was contrary to said Sections 2291 and 2292, Rev. Stats. U. S.; Section 10 of Article 1 of Federal Constitution; and contrary to the provisions of the Federal Constitution and Amendment XIV therto against denying due process of law in the matter of their federal rights and their property rights under acts of Congress and against the taking away from citizens of the United States their property without due process of law.

“XXI. That said State Supreme Court had overlooked the decisions by the United States Supreme Court in *Ard v. Brandon*, 156 U. S. 537, and *Ard v. Pratt*, 155 U. S. 537, reversing the Kansas Supreme Court in a case similar in many respects to the case at bar.

“XXII. That said State Supreme Court had overlooked it that its said last decision and directed decree, upon the undisputed facts and the law applicable thereto, had nullified the provisions of the Act of Congress referred to herein as Sections 2291 and 2292, U. S. Revised Statutes, and thereby nullified it illegally under that provision of the Federal Constitution known as Article 4, whereby said Constitution and the Laws of the United States made in

pursuance thereof shall be the supreme law of the land, and judges in every state shall be bound thereby, anything in the constitution or the laws of the state to the contrary notwithstanding.”

EACH AND EVERY OF THE ABOVE PROPOSITIONS were submitted and presented in said cause to said State Supreme Court at the first opportunity after it had set aside a proper and correct judgment and decree in favor of the very persons whom Congress said should have said land.

Assignments of error based on the foregoing were in due time filed in the said State Supreme Court and are printed at large on pages 102 to 122 of the printed transcript of record herein. And the said State Supreme Court allowed the writ of error for the purpose of reviewing those questions. See Order thereon printed at page 100, printed transcript of record, and at page 123 thereof.

Subsequently, in compliance with the Acts of Congress upon the making up of the transcript record, said heirs served and filed in the State Supreme Court their praecipe and designation on making up of the record on the error proceedings, and same are printed at large at pages 124, 125 and 126 of the printed record in this case in this court.

Afterward, and in compliance with Rule 10, of this court and said Act of Congress, said heirs served and filed their statement of points herein upon which they would rely, and the same are printed at pages 130 to 137 of the printed transcript as well as at pages noted as “APPENDIX” to the brief heretofore filed herein by said heirs against the defendant’s motion to dismiss; subsequently counsel for defendants in error served and filed with our designation on printing said transcript his designation by which he had the Honorable Clerk of this court to further print matters there were mere matters of repetition, etc., which we ask be taxed under the clause 9

of Rule 10 against defendants in error, regardless of the ultimate decree herein.

We make a part hereof the Abstract heretofore filed herein, and for convenience sake, now and here reprint the Index of the Abstract and Brief:

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“SPECIFICATIONS OF ERROR RELIED ON.

ASSIGNMENT OF ERROR NO. 1.

“Come now the above namde plaintiffs in error and hereby state to the court the following as the assignments of error on which they will and do rely in the above cause in the United States Supreme Court for a reversal of the decision and judgment of the Supreme Court of the State of Oklahoma, which last decision and judgment reversed the judgment and decree rendered in the favor of said plaintiffs in error and their predecessors against the said defendants in error decreeing said plaintiffs in error the

real and equitable owners, as donee beneficiaries under Section 2291 of the Revised Statutes of the United States of America, to and of the following described real estate situated in the Kay County, State of Oklahoma, to-wit: The Southwest Quarter of Section 11 in Township 26 North of Range 1 East of the Indian Meridian and that the said Luttie B. Jones held said real estate in trust for said plaintiffs in error and their predecessors, and that the mortgage given by said Luttie B. Jones and Elmer Jones, her husband to one P. H. Albright and by him assigned to the said The Phoenix Mutual Life Insurance Company, a corporation, prior to the patent from the United States to said Luttie B. Jones for said land, did not constitute any lien or incumbrance upon said premises and that said mortgage be cancelled, set aside and held for naught and adjudging that said Luttie B. Jones and her husband, Elmer Jones shall make a good and sufficient deed conveying said premises to said owners thereof, being the plaintiffs in error and their predecessors, by the term 'predecessors' is meant other heirs of Hollen H. Fearnow, deceased, and original entryman of said land which other heirs died during the pendency of the aforesaid litigation and these plaintiffs in error had the cause revived in them as such heirs and successors as provided by the laws of the State of Oklahoma; that the last decision of the Supreme Court of the State of Oklahoma herein complained of set aside in toto the judgment and decree aforesaid of said Kay County District Court and adjudged and decreed the entering in lieu thereof a judgment in favor of the defendants in said trial court known as Luttie B. Jones et al. The said plaintiffs in error in these proceedings objected and excepted to the said decision, judgment and decree of the Supreme Court of the State of Oklahoma, and duly filed in said State Supreme Court their petition for a rehearing specifying among other things that the said last decision of the Supreme Court of Oklahoma was erroneous and contrary to law and upon the undisputed facts and the law thereon deprived said

plaintiffs in error as aforesaid of their rights and property under the provisions of Section 2291 of the Revised Statutes of the United States of America and of the grant cast in their favor by said Act of Congress to said land as disclosed by the undisputed facts in said cause, and that as the only heirs at law of said deceased entryman Hollen H. Fearnow, there being no widow, they were entitled to said land under the provisions of said Section 2291 of said United States Revised Statutes, and that the proceedings and decision of the Department of the Interior upon the undisputed facts in the contest brought by said Emma F. Doepel, et al., against Luttie B. Jones to vacate and set aside a relinquishment made by her of the Hollen H. Fearnow homestead entry as his widow, when upon the undisputed facts and the law she was not his widow, was erroneous and a mistake of law and being made upon a motion of said Luttie B. Jones to dismiss said contest, erroneously and illegally upon the facts admitted by said motion, deprived the said heirs of their day in court and in view of the subsequent proceedings permitting said Luttie B. Jones to make her final proof to and receive a patent for said land, illegally and erroneously deprived said heirs as the designated beneficiaries under said Section 2291 and the admitted facts, of their rights and property in and to said land contrary to and in violation of the provisions of the Constitution of the United States and of Article fourteen of the amendments thereto, forbidding the deprivation of the rights and property of a citizen of the United States without due process of law, and that the said State Supreme Court of Oklahoma in its last mentioned decision aforesaid similarly deprived said heirs and these plaintiffs in error of their rights and property under said act of Congress, Section 2291, United States Revised Statutes and the admitted facts aforesaid, of their rights and property in and to said land as aforesaid, contrary to and in violation of said provisions of the Federal Constitution and Article fourteen of the amendment thereto.

“ASSIGNMENT OF ERROR No. 2.

“As a second assignment of error upon which the plaintiffs in error herein rely they state that the said cause between the said heirs on the one hand and the said Luttie B. Jones et al., on the other hand was once before taken from said Kay County District Court to said State Supreme Court of Oklahoma upon error to review a decision of said Kay County District Court sustaining a demurrer by said Luttie B. Jones to the petition of said heirs to declare the patentee aforesaid trustee for the real owners and to declare a resulting trust; that in said first appeal, the Supreme Court of Oklahoma reversed the trial court and directed it to overrule the demurrer to the petition and therein held that under the facts admitted by the demurrer said Luttie was not the widow of the entryman, that the Land Office had erred in the application of the law to the facts and that by their contest the said heirs had preserved their rights before the Land Office, and upon the facts plead in their petition were entitled to have a resulting trust declared, and said State Supreme Court remanded said cause to said Kay County District Court for further proceedings consistent with the law as declared in its said opinion and decision overruling said demurrer to said heirs’ petition; that after said remand the said Luttie B. Jones and Elmer Jones, her husband, filed a separate answer, as also did the said The Phoenix Mutual Life Insurance Company and in each of said answers there was admitted the facts plead by said heirs in said petition, except they omitted and avoided to state that when the said Hollen H. Fearnow and Luttie B. Jones went through the form of a marriage in the State of Kansas they were first cousins, and as a purported defense set up in brief that during the lifetime of Hollen H. Fearnow one Lena Barnes had filed a contest against said entry of said Hollen H. Fearnow charging the said entry to be speculative but omitted to state in said answers except by a copy of certain decisions appearing as exhibits in the case, that said charge of specu-

lativeness was in effect overruled by the decision of the Hon. Commissioner J. H. Fimple, and further set up in said answers the improvements and monies, paid out by said Luttie B. Jones on account of said land; there was no other defense whatever plead or attempted to be plead in said answers than the decision of the Register and Receiver on said speculativeness; that the said exhibits showed that the said decision of the Register and Receiver had been reversed and overruled by the Honorable Assistant Commissioner of the General Land Office. To said answers and each of them the said heirs filed in the said Kay County District Court their respective motions to strike out of the said separate answers those parts thereof setting up the said charge of speculativeness as constituting no defense to the said heirs' cause of action and attempting to raise immaterial issues and surplusage matter, which several motions were overruled by the trial court and exceptions taken thereto; that then said heirs filed their reply denying the allegations of said new matter in said answer and setting up the decision of the said Assistant Commissioner of the General Land Office by letter "H" January 20, 1905, setting aside all the proceedings in the said Lena Barnes contest including the said Register and Receiver decision and cancelling a homestead entry allowed said Lena Barnes in the interim, and also showing that Lena Barnes dismissed her contest on November 28, 1908. Upon the issues thus framed the case was tried before the Kay County District Court without a jury upon the pleadings, documentary evidence and other testimony, resulted in the judgment and decree hereinbefore mentioned as having been rendered by the trial court in favor of said heirs against said Luttie B. Jones and her husband, and against the holder of said mortgage, and upon the above the further contention and point is here made that the State Supreme Court of Oklahoma in its last decision and opinion and being the one herein complained of erroneously went outside of the issues in the case and based its decision reversing the decree of the trial court and directing

a decree for said Jones and said insurance company, in part, upon the purported doctrine of laches when there was no laches plead against said heirs in the answer and in its prior opinion said State Supreme Court held said heirs had preserved their rights by their contest proceedings and there was no proof in the record showing any delay on the part of said heirs in asserting their rights and the admitted facts showed that they had asserted their rights promptly and in due and reasonable season as far as they were permitted to do by the actions of the officials of the local U. S. Land Office, the Commissioner of the General Land Office and the Secretary of the Interior, and the erroneous and illegal acts of Luttie B. Jones and Lena Barnes based thereon, and the point is made that the said portion of the decision of the Supreme Court of the State of Oklahoma on the purported laches is contrary to the undisputed facts and the law and thereby deprives the said heirs of their said rights and property under said act of Congress and said admitted facts, contrary to and in violation of the provisions of the Federal Constitution and Article fourteen of the amendments thereto as hereinbefore specified.

“ASSIGNMENT OF ERROR No 3.

“As a third assignment of error said plaintiffs in error specify that the said Oklahoma State Supreme Court furthermore erroneously based its opinion and decision reversing said trial court's decree and directing a decree against said heirs and in favor of said Luttie B. Jones in part upon the purported defense of speculativeness, whereas the separate answers by the said Luttie B. Jones and *and* the said mortgage holder said insurance company, only plead the purported verbal contract claimed to have been made between Hollen H. Fearnow and his mother in her life time and as charged in the contest by Lena Barnes against Hollen H. Fearnow in his life time, which answers also set up the decision of the Register and Receiver made *ex parte* and without jurisdiction, omitting to state in the answer

that said Register and Receiver was subsequently vacated and set aside and said Lena Barnes contest subsequently dismissed by her, and no such question was presented or raised by said Luttie B. Jones as contestee in her defense of the contest against her void entry brought by said Emma F. Doepel and others, and the point is now and here made that

“(A) Said question was never before the Land Department except in the Lena Barnes contest which was a proceedings separate and distinct from the contest proceedings which this suit was brought to review.

“(B) That even in the Lena Barnes contest, although irrelevant to this case, the final adjudication was against said issue of speculativeness.

“(C) That the only testimony by witnesses on said charge is that set forth in the transcript of the proceedings in the Lena Barnes contest as contained in the decision by the Hon. Commissioner . H. Fimple, Assistant Commissioner, of letter ‘H’ on January 20, 1905, which said Commissioner Fimple held in connection with Hollen H. Fearnow’s showing he had a defense that was a meritorious one and could establish that said entry was made in good faith, etc., then Commissioner Fimple reversed the decision of the Register and Receiver on said charge of speculativeness and remanded said cause and said Barnes contest was dismissed without further proceedings therein after the mouth of Hollen H. Fearnow was sealed in death.

“(D) That said purported defense of speculativeness as attempted to be plead by Luttie B. Jones *a male-fide* holder of the said premises was not a proper matter of defense pleadable in an equity case proceeding by her;

“(E) That the purported defense of speculativeness in the entry by Hollen H. Fearnow is not a matter which could be set up against the grant and right cast by the Act of Congress upon the heirs of a deceased entryman, for Section 2291 U. S. Revised Statutes is an independent leg-

islative act by Congress, donating the preference right to the patent in favor of the heirs where there is no widow, and to hold that any default or taint on the part of the original entryman could be used by a person purporting to be the widow, when she was not, is, and *to use* the same against an original entryman alone, contrary to the letter and spirit of said Section 2291, U. S. Revised Statutes, and to that provision of the Federal Constitution forbidding enactment of any law working corruption of blood or Bill of Attainder.

“ASSIGNMENT OF ERROR No. 4.

“As the fourth assignment of error said plaintiffs in error specify that the said Oklahoma State Supreme Court in its syllabus to the opinion in the instant case held, First, ‘(1) That inasmuch as J (meaning defendant in error, Luttie B. Jones, the patentee) did not assert any right to the land as the widow of F (meaning Hollen H. Fearnow) or procure the issuance of the patent pursuant to Section 2291, Revised United States Statutes, the decision of the officers of the Land Department in declining to pass upon the validity of the marriage of F and J, were not erroneous.’ That said decision in said particular is erroneous in this, to-wit: Upon the dismissal of the Lena Barnes contest on Nov. 26, 1906, the filing of Hollen H. Fearnow upon said premises remained intact; that two days thereafter on Nov. 28, 1906, said Luttie B. Jones claiming to be the widow of Hollen H. Fearnow and as his widow relinquished the homestead entry of Hollen H. Fearnow upon said premises and homesteaded thereon in her own name on the same day. While it may be conceded that if she had a perfect right to relinquish entry, she could enter as she pleased, yet when it is admitted that she claiming to be the widow of Hollen H. Fearnow when she was not his widow, and acting as his widow relinquished his entry upon said premises, which relinquishment and her entry had they been valid would have cut off the rights given under Section 2291 of the Revised Statutes of the United States, it is

apparent that the question of whether she was his widow or not became a very material one in determining whether or not the relinquishment which she made as such widow was valid and her subsequent entry in her own name valid. For, if her dismissal was void it was ineffective to relinquish the entry of Hollen H. Fearnow and her entry upon the premises would likewise be void, for there cannot be more than one entry upon a piece of land at one time.

“ASSIGNMENT OF ERROR No. 5.

“As the fifth assignment of error said plaintiffs in error specify that immediately following the portion of the syllabus to said decision quoted in the fourth assignment of error the Supreme Court of the State of Oklahoma continues to say, ‘That the claim of the heirs resting upon their relationship with F., they are not entitled to the relief prayed for, because they did not pursue their remedy before the Land Department, pursuant to Section 2291, Rev. Stat. U. S.,’ and it is the contention of plaintiffs in error that said statement is an erroneous statement of the law as applicable to the facts in this case. Said Section 2291 gives to the heirs of a deceased entryman two years in which to exercise their preference right to consummate an entry on which they shall be entitled to the patent. Hollen H. Fearnow died Oct. 23, 1905, the Land Department permitted Luttie B. Jones to make as his widow a relinquishment of his entry and to make homestead entry thereon in her own name under the general provisions of the homestead law on Nov. 28, 1906, less than fourteen months after the death of the homestead entryman. In two weeks thereafter the heirs instituted their contest against said homestead entry of said Luttie B. Jones for the purpose of cancelling the relinquishment she had made of the homestead of the entryman and for the purpose of cancelling the homestead entry she had made in her own name, and for the purpose of getting the records in the Land Office in such condition that they could exercise their right given them by said Section 2291 of the Rev. Stat. to consummate their

preference right of making an entry in their own name by way of proof and patent. Said above quoted portion of the syllabus to the said opinion is directly contrary to said facts as above set forth and shown by the records of this case, and contrary to the law on segregation of the public domain and entry thereof.

“ASSIGNMENT OF ERROR No. 6.

“As a sixth assignment of error the plaintiffs in error contend that they were entitled to the relief prayed for in their petition in the trial court for that the admitted facts disclosed that they were the only heirs of the original entryman who was deceased, and that he had no widow at the time of his death and that he had resided on the land and cultivated it for more than five years, and that under the donee provisions of said Section 2291, U. S. Rev. Stats. they had a vested right as the designated beneficiaries of said Act of Congress preferred over and above all other persons by Congress and not merely because they were heirs through the law on descent and distribution, and that by the unlawful and erroneous segregation of said tract from the public domain by the erroneous entries thereof by Lena Barnes and Luttie B. Jones, respectively, they had been prevented from exercising their right under said Act of Congress through no fault of their own, but through the mistakes of law of said officials upon undisputed facts and the consequent illegal and erroneous segregation by the illegal and erroneous entries of Lena Barnes and Luttie B. Jones, respectively, and we make the point that the last decision of the Oklahoma Supreme Court is contrary to the undisputed facts and the law on said segregation and prevention.

“ASSIGNMENT OF ERROR No. 7.

“Finally, as and a seventh assignment of error we contend and urge that the Supreme Court of Oklahoma was bound by its decision made upon the first appeal in said cause whereby it settled the ‘law of the case,’ as to plain-

tiffs having a cause of action in equity under the admitted facts and the Act of Congress known as Section 2291, U. S. Rev. Stats., to declare and enforce a trust against said Luttie B. Jones in respect to said land, that in said first decision and the proceedings upon which it was based there was before the Supreme Court of Oklahoma for its consideration the decision of Assistant Commissioner Fimple in regard to the Lena Barnes contest against the original homestead entry made by the deceased entryman, Hollen H. Fearnow, that notwithstanding the said Barnes contest and decision therein by the Register and Receiver, the said State Supreme Court held that the plaintiffs had said cause of action, and specifically held that said heirs had preserved their rights by their said contest to cancel the unauthorized and void relinquishment made by Luttie B. Jones of the original homestead entry, said relinquishment so being made by her as the widow of Hollen H. Fearnow whereas she was not his widow and by said contest also to cancel the unauthorized and void entry made by said Luttie B. Jones as an ordinary homesteader immediately after the said void relinquishment by her. That the said trial court upon remand followed the 'law of the case' aforesaid. That the heirs proved their case. That the defendants Luttie B. Jones and her husband, Elmer Jones, and the holder of the mortgage by them, neither plead nor proved a defense cognizable under the rules, practice and usages of courts of equity. That the trial court correctly rendered and entered a decree as prayed for in favor of said heirs and against said purported widow, then the wife of Elmer Jones, against him and the mortgage made by him and her before the issuance of the patent to Luttie B. Jones for said land, that under the admitted facts and the law the decree of the trial court was correct and that the State Supreme Court of Oklahoma erred in setting aside said decree in toto and directing and entering a converse judgment, and in so doing said State Supreme Court violated the principle of estoppel whereby it was bound by its former decision of the 'law of the case' and upon the undisputed facts mis-

applied the law in its said last opinion and decision. Thereby depriving the said heirs of their rights under the said Act of Congress referred to as Section 2291, supra, contrary to the provisions of the Federal Constitution guaranteeing said rights to the said heirs, then and there citizens of the United States. That the premises of this point considered, the decision of the State Supreme Court of Oklahoma directing and entering said decree against said heirs should be reversed, and the decree in favor of said heirs by the District Court of Kay County, Oklahoma, should be affirmed."

ARGUMENT.

We hereby make the "arguments" urged by us in the prior briefs filed by us a part of this argument.

The decision, judgment and decree in trial court, in favor of the heirs, as sole beneficiaries under Sections 2291 2292, U. S. Rev. Stats., was correct.

Upon the admitted and undisputed facts and said Act of Congress they were the sole beneficiaries of said Act. Luttie B. had not been his wife but under the law of both Kansas and Oklahoma, she was living with him an incestuous, immoral and unlawful life every hour from the time they violated the said laws declaring said marriage incestuous, illegal and void, and she could not and did not acquire any rights whatever thereby, and hence was not his widow.

"All marriages between parents and children * * * and * * * between first cousins are declared to be incestuous, illegal and void, and are expressly prohibited" (Stats. of Kansas, May 27, 1867, Sec. 2), and which, in substance, was adopted by Oklahoma Territory and was the law at the time they went over into Kansas and went through the purported marriage ceremony. Also see Wilson's Rev. and Anno. Stats. of Oklahoma, Sections 3483, 2276.

Under the admitted facts, the above admitted laws and Sections 2291 and 2292, there can not be any dispute against the heirs' position that they were the only beneficiaries of said Act of Congress.

Sec. 2291 of the Revised Statutes, U. S., providing for the disposition of a homestead entryman's rights upon his death, is as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter the person making such entry, or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case

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of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

Sec. 2292 applies only where all the donees are minors, then to buy.

The entry made by Hollen H. Fearnow was made before Oklahoma statehood, namely, on March 29, 1889, and prior to the Act of Congress of May 2, 1890, which was cited in the lower courts and has been cited here in defendants' brief in support of their motion to dismiss; the precise point was advanced in *Howe v. Parker*, 190 Fed. 755, and there it was held "The attempt is to extend the disqualifications to a new class of persons (Henry Howe's heirs) and acts not specified in the statutes and to punish with disqualification an entryman who falls clearly within the qualified classes, described in the statute. The prohibitions and disqualifications of the statutes should be interpreted by the familiar rule that, where the statute is before the event, plain and unambiguous, the courts may not lawfully extend it to a class of persons who are excluded by its terms, nor by interpretation or construction after their commission make acts violation thereof which were not clearly such by the express will of the legislative department when they were done."

Not waiving the above proposition of law which the Oklahoma State Supreme Court ignored, we call attention of this court that no charges were pending before the Land Department against Hollen H. Fearnow's entry during

the contest of the heirs against the pretended widow, that the Barnes contest had been dismissed only two days before Luttie as widow, when she was not, relinquished the Hollen entry, and erroneously and without lawful authority was permitted to make a new entry of said tract, as a mere qualified entryman, and hence that question was not before the Land Department nor local land office at all in the proceedings whereby Luttie was wrongfully permitted to relinquish and re-enter, but under another law and in her own name; that question was before the trial court by defendants' answer, a motion against same, and the reply by the heirs setting up Commissioner Fimple's decision and the dismissal of the Barnes contest, and the trial court upon the admitted and undisputable facts found and adjudged in favor of the heirs.

The only evidence in the record herein is undisputed and in the transcript from the Commissioner's Office containing the Fimple Decision, wherein he held that the Local Office had not jurisdiction to cancel the Hollen entry and that upon appeal he, Hollen, had shown that he had a good and sufficient defense to the Barnes charge of "speculation"; the following is Judge Fimple's report of that testimony as shown at page 52 of the printed transcript:

"The testimony submitted by the plaintiff showed, in substance, that prior to the date of Fearnow's entry, his sister had made a homestead entry of the land embraced therein; that before making her said entry this sister had purchased the relinquishment of an entry to said land, then existing, for which she paid for or five hundred dollars, furnished by her mother; that she verably agreed with her brother, the defendant, that he should make entry of the land, hold the same for fourteen months, make final proof therefor, and deed the tract to his said mother in exchange for a wagon, harness and team of horses; *or in the event she and her mother did not desire him to so make final proof*, that he would pay to his mother rent for the land; that defendant paid such rent for two years, and

then refused to longer do so; that there was much bad feeling existing between defendant and other members of his family; and that the plaintiff (witness) was a sister, other than the one who had purchased the relinquishment, as aforesaid."

Just what the affidavit was that convinced Judge Fimple that Hollen had a good and sufficient defense to the charge is not disclosed, but it will be presumed that it was adequate. Furthermore, the testimony as reported by Judge Fimple was not sufficient to sustain the Barnes charge, for it disclosed no agreement whatever between the son and his mother; all it disclosed was that one of his sisters had made a conditional agreement with him; the only part of the conditions made and kept were that Hollen did make entry and hold the land for 14 months and more, but did not make final proof then for an exchange of a wagon, harness and team of horses, but did reimburse his sister for what money she paid a prior entryman for a relinquishment, and which reimbursement was realized by him from a portion of the crops raised on that land during the said fourteen months; and it takes a great stretch of the imagination to sustain any charge of "speculation" out of that evidence, the Land Decisions are against it, and the law on agreements to violate the law in the future conditionally is against it, especially in a case where the entryman did not agree to convey for a wagon, harness and team of horses delivered, but would pay rent for two season—which rent he paid out of crops, which they had all decided evidently, long before he would be required to swear whether he had agreed to deed the land to any other person. So from any angle that feature may be viewed the trial court was right and the State Supreme Court in error.

The case of *Gallier v. Caldwell* met its final decision in this court, in 145 U. S. 368, and did not turn on the proposition defendants contended in this case, and did turn on the limitations of actions, for Justice Brewer, speaking for this court, said, "the omission of the word 'widow' from

the Act of 1880 and the doubt whether she was a beneficiary under that act, or could claim any rights under it." * * * "It seems to us that equity forbids that a homestead right, created fourteen years before, for which only land office fees were paid, should at this late day be permitted to disturb a title legally perfect, created by the general government, for which full value was paid and on the faith of which costly improvements were made, to which she apparently contributed nothing;" so the law as declared by this court in that case instead of upholding any right or supposed right in favor of the pretended widow is clearly against her. She comes before this court admitting facts which, under the laws of Oklahoma, stamp and stamped her as living an incestuous and criminal life with Hollen, and that she was not his wife nor his widow, with any of the rights of such, and hence excluded from the benefits of the Congressional Act governing the disposition of Hollen's entry. There were no laches in the case of these heirs for they moved promptly by and through their contest against her, and by the erroneous segregations of that land, said heirs could not do other than they did—hence no laches as in the Galliher case. Luttie did not any of the things necessary to consummate an entry, for it is stipulated that Hollen resided upon and cultivated and improved land from the time he entered until the day of his death—more than five years—but had failed to make final proof, partly owing to the erroneous and jurisdictionless Barnes contest and consequent erroneous entry by Barnes.

The State Supreme Court arrived at its last decision, by overlooking and ignoring the law as declared by this court in said *McMichael v. Murphy* case; "a homestead entry in Oklahoma Territory which is valid on its face although made by one in fact personally disqualified to make a valid entry of the tract in dispute, prevents the initiation of homestead rights by another while it remains uncanceled of record by some direct action of the Land Office or by relinquishment." *McMichael v. Murphy*, 25 Sup. Ct. Reporter, 197 U. S.

The mortgage having been given before issuance of the patent, the mortgagee obtained no lien thereby on the land, if the mortgagor was not the rightful owner.

Easley v. Kellom, 14 Wall. 279.

The erroneous cancellation of a homestead entry made by one who dies before final proof, does not deprive the rightful successors to the deceased under Sec. 2292, Rev. Stats., U. S., of their preferred rights under said section.

Kunz v. Jochim, 37 L. D. 169, 171.

The R. & R.'s decisions where obtained by fraud and falsehood are reversible by this court. 22 How. 193 *Lytle v. Arkansas*.

The right or grant under said Section 2292, U. S. Rev. Stats., is in the nature of a vested right, in favor of the designated successor to make a new entry.

Lewis v. Lichty, 3 Wash. 213.

Gjerstadergen v. Van Dusen, 7 N. Dak. 612 and cited in Fed. Stat. Ann. Vol. VI, page 293.

Such heirs cannot claim any right by inheritance laws of the state or territory in such cases. Congress in alternative terms fixed several classes of such successors; each independent of and adverse to each other. The matter of degree of kin or fact of relation to the deceased homesteader created no claim. Such successor derives nothing by inheritance through the deceased entryman—the Federal Statute, Secs. 2291-2292, *supra*, created no law of descent and distribution but simply prescribed the order of succession to consummate and perfect a new entry.

Bernier v. Bernier, 147 U. S. 242, *et seq.*, and cases last above cited.

Where the successors to a deceased entryman are all minor children their preferred-vested right is to purchase outright through a guardian, and not in any manner or matter of inheritance. *Bernier v. Bernier*, *supra*, U. S. Rev. Stats., Sec. 2292.

“Relief against a patent for land issued by inadvertence and mistake can be granted to one who, being duly qualified and entitled, offered to enter the land, and on denial of his offer instituted a contest, which was pending at the time the patent was issued.” *Duluth & Iron Range R. R. Co. v. Roy*, 19 Sup. Court Reporter, 173 U. S. 587.

Ard v. Brandon and *Ard v. Pratt*, in the 156 U. S. 537; 15 Sup. Ct. Rep. 406, set the precedent that “where a person with a right to enter a tract did all that he or she was permitted to do by the officers and was thus prevented and hindered by wrongful acts, such person does not thereby forfeit or lose his rights, but such person has an equity which the Government and the courts must protect against a subsequent transfer of the legal title to a railway company under a grant.” Also to the same effect is Judge Ames’ opinion in the first decision in the case at bar; see *Fearnow et al. v. Jones*, 34 Okl. 694.

The last decision by the Oklahoma Supreme Court in this case is not yet reported in the state reports that we are able to find, but can be found in the 156 Pac. 309, and for convenience sake we give said publication.

We have no criticism to offer with the first syllabi in said decision as far as it goes, with the second syllabi as to the statements of fact, they are substantially correct, with the statement as to laches and as to what the Secretary erroneously held on that subject we disagree, and urge that it is contrary to every principle of fundamental law and the undisputed and undisputable facts and the law properly applied thereto, and that the construction given by said State Supreme Court thereto is likewise unsound, contrary to the undisputed facts of record in this case before it and before this court, and contrary to the law enacted by Congress referred to herein as Section 2291, U. S. Rev. Stats., and deprives said heirs of their rights under said statutes erroneously, and violative of the Federal Constitution on Due Process of Law, and prohibiting

the depriving of said property rights and property without giving them day in court.

Wherefore said plaintiffs in error pray the Court to reverse the said State Supreme Court of Oklahoma, in its said last decision and decree in the said cause, and to affirm the decree of the trial court awarding said land to said plaintiffs in error, and decreeing said Luttie B. Jones, holder of the legal title for their use and benefit, and that the mortgage given by her husband, Elmer Jones, and her is no lien or incumbrance on said land, and directing the defendants to make the deed ordered by the trial court within a given time or that the said decree by the trial court shall be evidence of said plaintiff's right to said land and to the immediate possession of said land and to the rents and profits therefrom, less taxes paid, if any, by said Luttie B. on said land. That defendants in error pay all the proper costs and expenses of this suit taxable under the rules of this court and the law, as well as the excessive expenses and costs occasioned these plaintiffs by said defendant designating unnecessary printing herein. And for all other proper and equitable orders and relief in the premises, ancillary to the enforcing of the decree in favor of said plaintiffs in said cause.

Respectfully submitted,

MILTON BROWN,
Am. Nat. Bank Bldg, Oklahoma City, Oklahoma.
Solicitor and Attorney for Said Plaintiffs in Error.

L. A. MARIS,
Ponca City, Oklahoma.

CODY FOWLER,
Am. Nat. Bank Bldg., Oklahoma City, Oklahoma.
Of Counsel for Said Plaintiffs in Error.

FILED
OCT 22 1916
U.S. DIST. COURT
OKLAHOMA

No. 73

OF THE
Supreme Court of the United States

OCTOBER TERM, 1916

HENRY F. DUEFEL ET AL., PLAINTIFFS
IN ERROR

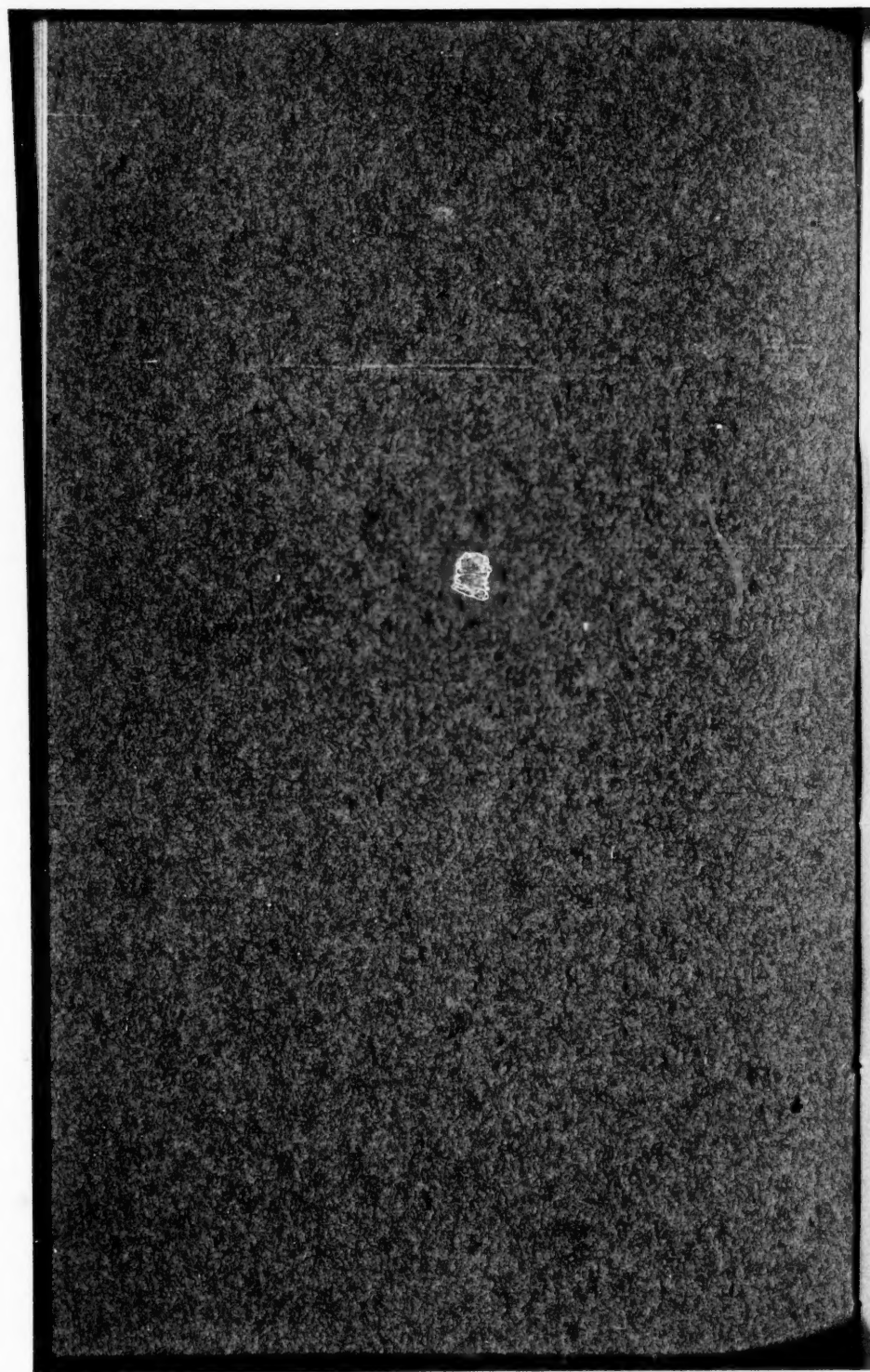
VS.

LETTIE B. JONES ET AL., DEFENDANTS
IN ERROR

ON WRIT OF ERROR TO THE SUPREME COURT OF OKLAHOMA.

Defendants in Error & Respondents in Error, the Writ
of Error is taken from the Opinion and Judgment
Rendered by the Supreme Court of Oklahoma,
Notice to Plaintiff in Error and Answer filed
under the said writ and from the Opinion of said Court.

J. F. KING,
Counsel for Defendants in Error.
W. B. LINDSEY and
L. D. MOORE,
Of Counsel for Defendants in Error.
The Phoenix Mutual Life Insurance Co.



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No. 571.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

EMMA F. DOEPEL ET AL., HEIRS AT LAW OF
HOLLIN H. FEARNOW, DECEASED, PLAINTIFFS IN ERROR,

VS.

LUTTIE B. JONES, ELMER JONES, AND THE
PHOENIX MUTUAL LIFE INSURANCE
COMPANY.

ON WRIT OF ERROR TO THE SUPREME COURT OF OKLAHOMA.

**Motion on Behalf of Luttie B. Jones, Elmer Jones,
and The Phoenix Mutual Life Insurance Company,
Defendants in Error, to Dismiss the Writ
of Error or Affirm the Opinion and Judgment
Rendered by the Supreme Court of Oklahoma.**

Come now the defendants in error, Luttie B. Jones
and Elmer Jones, by their counsel, J. F. King, and the
Phoenix Mutual Life Insurance Company by its counsel,

J. F. King, W. P. Hackney and L. D. Moore, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction upon the grounds herein-after set forth in the brief filed herewith.

Defendants in error further move the court to affirm the opinion and judgment rendered by the Supreme Court of Oklahoma, upon the ground that it is manifest, that the writ of error was taken for delay only; and that the questions on which the decision of the cause depend, are so frivolous as to not need further argument. The grounds of these motions, the statement of the case, facts and argument are more fully set forth in the briefs accompanying the motions. All of which is herewith

Respectfully submitted,

J. F. KING,

Counsel for Defendants in Error.

W. P. HACKNEY and L. D. MOORE,

Counsel for Defendant in Error,

The Phoenix Mutual Life

Insurance Company.

To Emma F. Doepel, Percy Hill, R. C. Fearnow, Emma F. Doepel, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner, and Richard T. Fearnow, infants, plaintiffs in error, and to Milton Brown and L. A. Maris, counsel for all of the plaintiffs in error in the above mentioned cause.

Please take notice that on the 2nd day of April, 1917, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Attached hereto are copies of the motions to dismiss and affirm and the briefs and arguments to be submitted in support thereof.

J. F. KING,
Counsel for Defendants in Error.
W. P. HACKNEY and L. D. MOORE,
Counsel for Defendant in Error,
The Phoenix Mutual Life
Insurance Company.

We hereby acknowledge receipt of a copy of the above notice, motions to dismiss, and affirm, and of the briefs and arguments this 7th day of March, 1917.

L. A. MARIS,
MILTON BROWN,
Attorneys for Plaintiffs in Error.

No. 571.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

EMMA F. DOEPEL ET AL., PLAINTIFFS
IN ERROR,

VS.

LUTTIE B. JONES, ELMER JONES AND THE
PHOENIX MUTUAL LIFE INSURANCE COM-
PANY, DEFENDANTS IN ERROR.

**Defendants in Error's Briefs on Motions to Dismiss
the Writ of Error for Want of Jurisdiction and
to Affirm the Judgment of the State Court.**

STATEMENT OF CASE.

The president of the United States issued to the defendant in error, Luttie B. Jones, formerly Luttie B. Fearnow, a patent to a quarter section of land in Kay

County, Oklahoma, under the homestead laws of the United States *and in her own right*. After the issuance of this patent, the plaintiffs in error and one Emily B. Fearnow, now deceased, and whose heirs plaintiffs in error are, filed their petition in the District Court of Kay County, Oklahoma, alleging that they were the heirs of Hollin H. Fearnow. That Hollin H. Fearnow had filed on this land under the homestead laws of the United States and resided upon and cultivated the land up to the time of his death in October, 1905; but had never proved up on the land. That in 1901, he and the plaintiff in error, Luttie B. Jones, were married to each other, but they being first cousins, the marriage was void.

That more than a year after the death of Fearnow, she, falsely claiming to be the widow of Fearnow, relinquished the entry of Fearnow and was permitted by the Land Department, and did file her homestead entry upon said land in her own individual right as a competent homestead entryman and not as widow. That they filed in the United States Land Office, a contest affidavit, against her entry on the ground of the invalidity of the marriage, which was rejected by the local office for the reason that the department could not determine the validity of the marriage. That this decision was affirmed by the commissioner of the general land office and his decision in turn affirmed on appeal by the secretary of the interior. That she proved up and paid for the land and the president issued to her the patent; that they are the equitable owners of the land and ask the court to so de-

cree; and that she be held to be a trustee of the legal title for their benefit (Printed Record page 17).

Attached to this petition is a copy of the decisions of the local officers, commissioner of the general land office and secretary of the interior (Printed Rec. pp. 24-26).

To this petition, the defendants filed a general demurrer which was sustained and on appeal the Supreme Court commission reversed and remanded the case, holding the marriage void on the ground of consanguinity; and that its validity could be inquired into in this case; and that without a previous decree of nullity. Defendants filed their answer in which they allege, among other things, that this land was subject to homestead entry on March 29th, 1899.

"That about three or four days previous to the said 29th day of March, A. D. 1899, the plaintiff, Emily F. Fearnow, and the said Hollen H. Fearnow made and entered into a verbal contract whereby it was mutually agreed and understood, by and between them, that the said Emily F. Fearnow would give to the said Hollen H. Fearnow a team of horses and harness in consideration of which the said Hollen H. Fearnow was to and would file on said land and would immediately settle upon and farm the said land and pay to the said Emily F. Fearnow, one-half of what crops he raised upon the said land in the year 1899, and one-third of the crops he raised on said land each and every year thereafter; and would prove said land up and obtain a patent from the United States for the same in his own name as patentee and then deed the said land to the said Emily F. Fearnow. That in three or four days after said contract and agreement was

made and entered into, and in pursuance of and in accordance and compliance with the said contract, the said Hollen H. Fearnow on, to-wit: the 29th day of March, A. D. 1899, did file upon and make homestead entry of said land in the United States land office at Guthrie, Oklahoma, and he immediately delivered to said Emily F. Fearnow his filing papers for the same, to-wit: The Receiver's duplicate receipt therefor, and did immediately settle upon the said land and continued to occupy and improve the said land and farm the same until the . . . day of October, 1905, on which date he died without having made final proof therefor, or having proved up the said land.

"That the said Emily F. Fearnow did procure the said Hollen H. Fearnow to settle upon the said land with the intent thereafter to acquire title therein herself, and said entry was not made for the use or benefit of said Hollen H. Fearnow, but illegally and for the use and benefit of said Emily F. Fearnow.

That the said Hollen H. Fearnow paid the rent of said land to the said Emily F. Fearnow; that this defendant, Luttie B. Jones, and the said Hollen H. Fearnow were duly and legally married to each other on the 26th day of August, 1901, and she immediately went to live with the said Hollen H. Fearnow on said land and resided thereon as her home continuously and improved the same from said date until the day of, 1910."

That on May 16th, 1903, on Lena Barnes filed her contest affidavit against the homestead entry of Fearnow; and that the local land office cancelled his entry on account of his said contract with Emily F. Fearnow, his mother, and Lena Barnes was permitted to and made homestead entry on the land. That Hollen H. Fearnow

died in October, 1905, and on November 26th, 1906, Lena Barnes relinquished her homestead entry and on November 28th, 1906, the land being subject to homestead under the homestead laws of the United States, Luttie B. Jones, defendant, filed on said land in her own right as a competent homestead entryman and not as widow.

That she lived on and improved the land as provided by the laws of the United States, proved up the same and paid the United States its price for the land, \$435.85, all in her own right as a citizen and competent entryman and not as widow; and all these things being established to the satisfaction of the president of the United States, the president issued to her the patent (p. 27).

The defendant in error, the Phoenix Mutual Life Insurance Company, filed a similar answer and in addition set up its mortgage for Three Thousand Dollars executed by Luttie B. Jones to it on said land after final proof; and that it had no notice of any claim of the plaintiffs at the time of parting with its money. Plaintiffs replied denying these allegations except that they admitted cancellation of the entry of Hollen H. Fearnow by the local office, and the granting of a new trial because of defective notice (p. 44).

The case was tried upon an agreed statement of facts except as to some formal matters which are not material to these motions. This agreed statement which was read in evidence by the plaintiffs, omitting caption, is as follows:

"It is hereby stipulated and agreed by and between the plaintiffs and defendants in the above cause that the following are facts and may be read in evidence in the trial of said case by any of the said parties and on any trial between the said parties or any of them, their heirs, successors, assigns or personal representatives wherein the title to the real estate hereinafter described may be involved. The Southwest Quarter of Section Eleven (11), Township Twenty-six (26) North of Range One (1) East I. M. in Kay County, Oklahoma, was on, to-wit: the 29th day of March, 1899, vacant public land, acquired under the homestead laws of the United States. That about three or four days previous to said 29th day of March, 1899, one Hollen H. Fearnow, the son of said Emily F. Fearnow proposed to her that he would file on said land and prove up the same, under the said homestead laws, and would then deed the same to her for a team of horses and harness, and pay her the usual rent for said land, which she then stated to him she accepted; and it was then and thereupon mutually agreed orally by and between the said Emily F. Fearnow and the said Hollen H. Fearnow, that the said Hollen H. Fearnow was to, and would, file on said land, under the homestead laws of the United States, and would immediately settle upon, improve and farm the same as required by said laws, and would prove up said land and obtain a patent from the United States for the same in his name as patentee, and then deed the said land in fee simple to said Emily F. Fearnow, and would turn over and pay to her one-third of the crops he raised on said land in the year 1899, and one-third of the crops he raised thereon each and every year thereafter as rent. That in three or four days after said contract and agreement was made and entered into, and in pursuance of and compliance with his said contract, the said Hollen H.

Fearnow on to-wit: the 29th day of March, A. D. 1899, did file upon and make homestead entry No. 10171 of the said land, in the proper United States Land Office, to-wit: Perry, Oklahoma, and he immediately delivered to said Emily F. Fearnow his filing papers for the same, to-wit: The receiver's duplicate receipt therefor, and did immediately settle upon the said land and continue to occupy and improve the said land and farm the same until the day of October, A. D. 1905, on which date he died without having made final proof therefor, or having proved up the land.

"That on the 16th day of May, 1903, one Lena Barnes filed her affidavit of contest against the said entry of said Hollen H. Fearnow in the United States Land Office at Guthrie, Oklahoma, charging that the said land was filed on by him for the purpose of speculation, and was held for speculative purposes, and not for the purpose of making it his home, and that he was holding it fraudulently, illegally and for the use and benefit of another person, to-wit: Emily F. Fearnow, and that for a valuable consideration he had contracted and agreed with the said Emily F. Fearnow to prove up on said land and obtain a patent therefor, and then transfer the same to said Emily F. Fearnow, who is one of the plaintiffs in this case.

"That a trial of the said contest was had before the register and receiver of the said office, on the 10th day of August, 1903, and on the 13th day of December, 1903, the said register and receiver rendered their decision thereon, holding and adjudging that the charges in the said affidavit were true; that said entry was not made for the use or benefit of the said Hollen H. Fearnow, but was made for the use and benefit of the said Emily F. Fearnow, for the consideration and in pursuance of the contract above set out, and that the entry was

void from its inception, and cancelled said entry, and thereupon the said Lena Barnes was by the said register and receiver permitted to and did file on said land, and did make her homestead entry No. 13690 on September 6, 1904, of said land under the homestead laws of the United States, in said office for said land. That an appeal was taken by the said Hollen H. Fearnow from said decision to the Commissioner of the General Land Office, where, and by whom on the 20th day of January, 1905, the notice of said contest was vacated, and another hearing thereof ordered, a copy of the said findings and decision of the Commissioner is hereto attached and made a part hereof. That no appeal was taken by the said Lena Barnes from the said order and decision of the said Commissioner and no further hearing was ever had on said contest, and said contest was not revived against the heirs of Hollen H. Fearnow after his death. That on the 26th day of November, 1906, said Lena Barnes dismissed her said contest and relinquished her said homestead on and to said land. That thereafter on the 28th day of November, 1906, the defendant Luttie B. Jones, then Luttie B. Fearnow, filed a relinquishment of the homestead entry of Hollen H. Fearnow, and the same was filed by her, claiming to be the widow of the said Hollen H. Fearnow, and without the knowledge and consent of the plaintiffs in this action, or any of them, and without the knowledge and consent of the defendant R. C. Fearnow. That thereafter and on the same day, November 28, 1906, the said Luttie B. Jones, then Luttie B. Fearnow, filed her homestead entry No. 14423 on said land, in the United States Land Office at Guthrie, Oklahoma; that at said time she was an unmarried female over the age of 21 years, a native born citizen of the United States, and was the owner of no land, nor had she at any time previous thereto been the

owner of any land, nor had she at any time previous to her said entry made homestead entry upon any of the lands of the United States, and was at the time of her said entry a qualified entry woman and homesteader, under the homestead laws of the United States."

That thereafter the plaintiffs filed their contest affidavit in the local office against the entry of Luttie B. Jones, then Luttie B. Fearnow; and that a true copy of the same is attached to the petition marked Exhibit "A." That on January 5th, 1907, the local land office rejected the contest affidavit as insufficient and rendered a decision in favor of the contestee, Luttie B. Fearnow, now Jones, a true and correct copy of which decision is attached to plaintiffs' petition under mark of Exhibit "X."

That the Commissioner of the General Land Office affirmed said decision on appeal, a copy of which decision is attached to the petition under mark of Exhibit "B." That on appeal, this decision was affirmed by the secretary of the interior on September 1st, 1907, and the land awarded to the defendant, Luttie B. Fearnow, now Luttie B. Jones; and that a correct copy of the said decision of the secretary is attached to plaintiffs' petition under mark of Exhibit "C."

That Hollen H. Fearnow and Luttie B. Jones were first cousins by blood; and that on August 26th, 1901, at Wichita, Kansas, they were duly married to each other; and that they lived together as husband and wife on this land from the date of the marriage to the date of his death, and she continued to reside upon and cultivate and

improve the said land up to the year 1910. That she paid the government for the land and made her final proof in her own right under the homestead laws of the United States; and that she executed the three thousand dollar mortgage to the Phoenix Mutual Life Insurance Company after the making of this final proof; and that up to the time the company parted with its money, did not know that the plaintiffs claimed any right in the land; and that the patent was issued by the United States to her, (Printed Rec.' page 47, *et seq.*).

The decision of the commissioner of the General Land Office, made a part of this agreed statement of facts, is as follows:

"I have therefore this day set aside all the proceedings had before you in the premises, and you are hereby instructed to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690, which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. No. 10171 reinstated" (Fearnows) (Record page 55).

It will be observed that the commissioner did not set aside the cancellation of Hollen H. Fearnow's entry nor reinstate his entry, nor did he cancel Lena Barnes' entry.

The plaintiffs read in evidence the affidavit of contest by the plaintiffs in the land department against the entry of Luttie B. Jones (Rec. p. 55). Now, this affidavit of contest, which is set out at page 21, is as follows:

CONTEST AFFIDAVIT.

"Territory of Oklahoma, County of Kay, ss.

Personally appeared before me, George B. Waltz, a notary public in and for the county of Kay, Territory of Oklahoma, Emily F. Fearnow and Emma F. Doepel, of Ponca City, Oklahoma Territory, who, upon their oaths, say:

"That they are each well acquainted with the tract of land embraced in the Homestead Entry of Lutte B. Fearnow, No. 14423, made November 28th, 1906, for the Southwest Quarter of Section Eleven (11), Township Twenty-six (26) North, Range One (1) East I. M., located in Kay County, Oklahoma, and know the present condition of the same; and as ground of contest against said entry, state and allege:

"That heretofore, to-wit: on March 29th, 1899, one Hollen H. Fearnow filed his Homestead Entry No. 10171 on said above described land; that on May 16, 1903, one Lena Barnes filed contest No. 3665 against the Homestead Entry of the said Hollen H. Fearnow, No. 10171; that pending the final disposition of the said contest of the said Lena Barnes, to-wit, on October 23, 1905, the said Hollen H. Fearnow departed this life leaving surviving him as his heirs the following persons, to-wit:

"His mother, Emily F. Fearnow, one of the affiants; his sister, Emma F. Doepel, the other affiant, both over twenty-one years of age. Also the following minor heirs who are still living and are still minors:

"Toledo Chamberlain, age three, daughter of Nora A. Chamberlain, deceased, who was a sister of Hollen H. Fearnow, deceased, Ethel, age seventeen, Hillery Turner, age sixteen, Lester Turner, age fourteen, Cecil Turner, age thirteen, all children of Alferetta S. Turner, deceased, who was a sister of Hollen H. Fearnow, deceased; Walter Hadley, age

ten, son of Ignolia Handley, deceased, who was also a sister of Hollen H. Fearnow, deceased; Neva McGrew, age eleven, Ralph McGrew, age ten, Violet McGrew, age eight, Grace McGrew, age seven, all children of Anna M. McGrew, deceased, who was a sister of Hollen H. Fearnow, deceased. That there are no other legal heirs of the said Hollen H. Fearnow, deceased.

"That the said Hollen H. Fearnow was a single man at the time of his death and a resident of the Territory of Oklahoma; that under and by virtue of the laws of the Territory of Oklahoma, his mother, living sisters and brothers, and the children of his deceased sisters taking the share of their deceased mothers, inherit an equal share of his estate, to-wit, a one-eighth share.

"That before the death of the said Hollen H. Fearnow his said Homestead Entry No. 10171 was cancelled by virtue of the contest of the said Lena Barnes; that the said Lena Barnes made Homestead Entry on said above described tract of land, the same being Homestead Entry No. 13691 and made September 6, 1904; that afterwards and before the death of the said Hollen H. Fearnow by letter 'H' of January 20, 1905, from the Commissioner of the General Land Office, the said Homestead Entry of the said Lena Barnes was suspended and all the proceedings in the said contest was set aside because of no legal service of notice of said contest on the said Hollen H. Fearnow, contestee, therein, and a new hearing was ordered in said case; that before the final trial and upon this new hearing of the said contest said Hollen H. Fearnow died.

"Said contest of the said Lena Barnes was never at any time revived against the heirs of the said Hollen H. Fearnow, deceased, and said heirs were not made parties thereto.

"That on November 28, 1906, the said Lena Barnes dismissed said contest and relinquished all

claim and title to the said Southwest Quarter of Section eleven (11), Township twenty-six (26) North Range One (1) East I. M., the land covered by her said Homestead Entry No. 13690. That as against these affiants and the other heirs of the said Hollen H. Fearnow, deceased, the said Lena Barnes had no right, title or claim to the said above described land because she failed and neglected to revive said contest against said heirs and had in fact no right or claim to relinquish.

"That on November 28, 1906, the contestee herein, Luttie B. Fearnow, claiming to be the widow of the said Hollen H. Fearnow, deceased, without the knowledge or consent of these affiants or the other heirs of the said Hollen H. Fearnow, filed in the United States Land Office at Guthrie, Oklahoma, a purported relinquishment of the said Homestead Entry of the said Hollen H. Fearnow, made March 29, 1899, No. 10171, covering the Southwest Quarter of Section eleven (11) Township twenty-six (26) North, Range One (1) East of the Indian Meridian, that said relinquishment is null, void and of no effect as against the heirs of the said Hollen H. Fearnow, deceased. That at the same time and place the said Luttie B. Fearnow filed her Homestead Entry No. 14423 on the land above described; that the said Homestead Entry is null and void because of the rights of the heirs of the said Hollen H. Fearnow; that said rights could not be relinquished by the said Luttie B. Fearnow, and her attempted entry made in her own rights should be cancelled.

"Affiants further say that the contestee, Luttie B. Fearnow, claims to be the widow of Hollen H. Fearnow, deceased, but affiants allege the facts to be that on August 26, 1901, at Wichita, State of Kansas, the said Hollen H. Fearnow, deceased, and Luttie B. Fearnow, contestee, went through a pretended marriage ceremony; that at the time of said pretended marriage said parties were residents of the Terri-

tory of Oklahoma; that the said Hollen H. Fearnow and the contestee, Luttie B. Fearnow, were first cousins by blood, the fathers of the said parties being brothers; that both the laws of the Territory of Oklahoma, and of the State of Kansas, at the time of said marriage, and at this time prohibit the marriage of first cousins by blood and declare said marriages to be incestuous and absolutely void. The law of Kansas then and now in force being as follows, to-wit:

" 'All marriages between parents and children, including grandparents and grandchildren of any degree, between brothers and sisters of the one-half blood as well as the whole blood, between uncles and neices, aunts and nephews, and first cousins, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.' " Act May 27, 1867, Section 2.

"The law of Oklahoma then and now in force was and is as follows, to-wit:

" 'Marriages between parents and children, ancestors and descendants of any degree, of a step-father with a step-daughter, a step-mother with a step-son, between uncles and neices, aunts and nephews, between brothers and sisters of the half as well as the whole blood, father in law and daughter in law, mother in law and son in law, and first cousins are declared to be incestuous, illegal and void and are expressly prohibited.' "

"Affiants further allege that the contestee, Luttie B. Fearnow, pretending and claiming to be the widow of Hollen H. Fearnow, deceased, is now and has been continuously since the death of Hollen H. Fearnow, on October 23, 1905, forcibly holding possession of the above described land against the rights and claims of the lawful heirs of the said Hollen H. Fearnow, deceased.

"Affiants make this affidavit and bring this contest on behalf of themselves and all the other heirs of the said Hollen H. Fearnow, deceased.

"And all the allegations herein made, affiants are ready to prove at such time as may be named by the register and receiver for a hearing in said case and we therefore ask to be allowed to prove said allegations and that said Homestead Entry No. 14423 may be declared cancelled and forfeited to the United States, they the said contestants, paying the expense of such hearing.

EMILY F. FEARNOW.

EMMA F. DOEPEL.

Subscribed and sworn to before me this 5 day of December, 1906.

(Seal)

GEO. B. WALTZ,

Notary Public.

My commission expires Nov. 29, 1908."

These plaintiffs also read in evidence the decision of the Secretary of the Interior on this alleged contest (p. 55), which is set out at page 25 of the record, and is as follows:

"EXHIBIT C."

H. S. B. Department of the Interior, E. F. B.
D. 921. Washington, Sept. 1, 1907.

EMMA F. DOEPEL, ET AL.

VS.

LUTTIE B. JONES, NOW FEARNOW.
APPEAL.

"The Commissioner of the General Land Office.

Sir: This appeal is filed by Emma F. Doepel and others as heirs of Hollen H. Fearnow, from the decision of your office of May 13, 1907, dismissing their contest against the Homestead Entry of Luttie B. Jones, for the S. W. $\frac{1}{4}$ Sec. 11, T. 26 N., Range 1 E., Guthrie, Oklahoma.

"The contestants are the mother, the sister and the brothers of Hollen H. Fearnow who made entry of the land March 29, 1899, but whose entry was cancelled upon the contest of Lena Barnes, the contestant Barnes on September 6, 1904, made entry of the land. Fearnow died Oct. 23rd, 1905, and after his death the decision cancelling his entry was vacated January 20, 1905, and a new hearing was ordered upon the contest of Barnes against the Fearnow Entry. November 28, 1906, Barnes dismissed her contest relinquished her entry and on the same day Luttie B. Fearnow, as widow, filed a relinquishment of Hollen H. Fearnow's entry and was allowed to make entry of the land in her own right.

"The contestants allege that the entry of Luttie B. Fearnow is null and void for the reason that her pretended marriage with Hollen H. Fearnow was invalid; this is a question the department cannot determine from the record before it. But independent of this contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right, it would be necessary to reinstate that entry and to show that it was improperly cancelled not by reason of any technical objection in the procedure, but upon its merits. Furthermore their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry.

"Your decision is affirmed, and the papers are returned herewith.

Very respectfully,
(Signed) JESSE E. WILSON,
Acting Secretary."

BRIEF.

What title, right, privilege or immunity claimed by plaintiffs in error, under the Constitution, treaties or laws of the United States, has been denied them by the decision of the Supreme Court of Oklahoma in this case? What Federal question is there in the case? It will be remembered that this case was tried upon an agreed statement of facts in writing, and this agreed statement, outside of the exhibits, does not cover to exceed five pages of the printed record (printed Rec. p. 47) ; and that this suit was brought by Emily F. Fearnow, for herself and her descendants, the mother of Hollen H. Fearnow, she, who with him, entered into this corrupt and unlawful agreement to defraud the United States, and this defendant in error and other prospective homesteaders ; and who procured this perjury to be done and after she had obtained this decree and the case was pending in the Supreme Court, she died and her alleged interest revived in the names of her descendants.

It will also be remembered that these plaintiffs, themselves, offered and introduced upon the trial, the evidence of these things, came into a court of equity with these soiled and dirty hands and procured this decree.

The Act of Congress, known as the Organic Act of Oklahoma (26 Stat. L. 81), approved May 2nd, 1890, in force during all the years above mentioned and still in force so far as these public lands are concerned, provides :

“Section 24. That it shall be unlawful for any person, for himself or any company, association, or

corporation, to directly or indirectly procure any person to settle upon any lands open to settlement in the Territory of Oklahoma, with intent thereafter of acquiring title thereto; and any title thus acquired shall be VOID; and the parties to such fraudulent settlement shall severally be guilty of a misdemeanor, and shall be punished upon indictment, by imprisonment, not exceeding twelve months, or by a fine not exceeding \$1000.00, or by both such fine and imprisonment, in the discretion of the court" (*our italics*).

In addition, Federal Statutes Annotated, Volume 6, Section 2289, provides for the taking of homesteads on the public domain, and the following Section 2290, provides as follows:

"That any person applying to enter land under the preceding section, shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he, or she, is the head of a family, or is over twenty-one years of age, and that such application is honestly made, and in good faith, made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporations, and that he, or she will faithfully and honestly endeavor to comply with all the requirements of law, as to settlement, residence, and cultivation, necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not

make any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except himself or herself, and upon filing such affidavit with the register or receiver, on payment of \$5.00 when the entry is of no more than 80 acres, and on payment of \$10.00 when the entry is for more than 80 acres, he or she shall thereupon be permitted to enter the amount of land specified."

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow, or in case of her death, his heirs or devisees; or in case of a widow making such entry, her heirs or devisees, in case of her death, proves by two credible witnesses, that he, or she, or they, have resided upon, or cultivated the same for the term of five years, immediately succeeding the time of the filing of the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in Section 2288 and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she or they, if at that time citizens of the United States shall be entitled to the patent, or in other cases provided by law."

These are but a few of the Acts of Congress, not to mention the rules and regulations of the land department, which prevent corrupt traffickers in these public lands from despoiling the government and competent applicants of this great inheritance. This agreement on the part of Hollen H. Fearnow, and plaintiff below, Emily F. Fear-

now, by which he agreed to prove up this land for her benefit and deed it to her, absolutely disqualified him from filing upon, or entering this land; or to use the language of the department in this case "the entry was void from its inception." He could not acquire any interest in, or right to this land, present, or prospective, inchoate, or vested. To permit him to do so, is to violate the plain letter, as well as the spirit of the laws. It is elementary that any competent homesteader, having this evidence, could cancel his entry, and take this land away from him, before any tribunal, having authority to pass on the matter. The facts being established as here, his entry, and his claim are nothing. He had nothing, and it follows as the night, the day, that if he had nothing, neither his co-conspirator, Emily F. Fearnow, plaintiff below, nor his heirs could have anything. There is no entry, there is no filing, there is no segregation to which they could connect or attach. There is nothing to claim the benefit of. The case at bar is covered as by a blanket, by the case of *Gallagher v. Cadwell*, 18 Pac. 68. In that case Silas Gallagher entered land under this homestead act, and before making final proof, he died. His widow, Maria J. Gallagher claimed the benefit of his entry and attempted to prove it up as his widow, and obtain patent, but the Land department awarded it to her contestant Wing. In this case she attempted to have Wing declared the trustee of the patent, and of the title for her benefit, but the court decided against her. The court finds that Silas Gallagher did not enter the land in good faith, for the purpose of a

home, but that he entered it for speculative purposes, and in the opinion says:

" 'If his entry was made for any other purposes than this (a home for himself and family), it was fraudulent *and void, and no equity can be founded on it.* This is not the case of an original, valid entry, afterwards abandoned, but of an original void entry. The above consideration alone would be sufficient to prevent any holder of the legal title to be held a trustee for the fraudulent entryman' " (Our italics).

To the same effect

Watts v. Amos, 14 Okla. 178.

32 Cyc. 115.

" " 1051.

" " 1061.

" " 806.

Pac. Livestock Co. v. Gutry, 61 Pac. 422.

Friedman & Co. v. State, 131 Pac. 529.

And this court has uniformly held, so far as we have been able to find in this class of cases, that whenever such an agreement is made to appear, it is also made to appear that there is no federal question in the case, for the parties claiming through such an entry have no right to the land and no rights secured to them by the constitution, treaties, or laws of the United States, has been denied them.

In the leading case of *Udell, et al. v. Davidson*, 7th How. 769, it appears that a man by the name of Gregory, by previous agreement with one Miller, made entry upon public land and by which agreement the land was to go

to Miller. The land was proved up and it was sought by those claiming under Miller to enforce his alleged rights. Mr. Chief Justice Taney, in delivering the opinion of the court on the motion to dismiss the writ of error to the Supreme Court of Illinois, says:

"They defend themselves upon the ground that the transaction between them and Gregory, by which the entry was made under a previous contract to convey, was a violation of the Act of 1838. This is undoubtedly true; for the Act requires the party who claims the right of pre-emption by residence to make oath that he has not contracted to sell or transfer the land to another person. And he is not permitted to purchase at the low price at which the person entitled to pre-emption is allowed to buy, until this oath is taken and filed with the register of the land office. But if he swears falsely, he is liable to an indictment for perjury, and forfeits all title to the land, and deeds made by him convey no title, unless they are made to a *bona fide* purchaser without notice. The plaintiffs in error admit they participated in the fraud and consequently Udell, upon his own showing, has acquired no right to the land under the Act of Congress on which he relies.

"They do not claim that he obtained a valid title under the law, but insists that the transaction was against its policy and in violation of its principles. What right or privilege does he then claim under this Act of Congress? It is this. He not only admits but insists, that, by a fraud upon the government, he has obtained a deed to himself for this land; and that he being trustee for the creditors of Miller, used the money which belonged to his *cestui que* trusts to accomplish his purpose; and now contends, that by means of this fraud upon the government, he has acquired under this Act of Con-

gress, a right to perpetrate a fraud also upon his *cestui que* trusts.

"This in plain words, is the amount of his defense; and this is the right or privilege which he claims under the provisions of the Act of 1838 and calls upon this court to recognize and maintain. We shall not comment on such a claim. The writ of error must be dismissed for want of jurisdiction."

So here these plaintiffs and their predecessors come into court and thus prove and proclaim this fraud and perjury, and ask the court to approve of it and give them the fruits of it and defraud the government, and this woman who has followed slavishly and servilely every rule, regulation and holding of the land department, the decisions of the court and the laws of the United States for these many, many years.

Counsel will, no doubt, continually and in every possible light, present the claim that she relinquished the homestead entry of Hollen H. Fearnow, claiming to be his widow, but it must be remembered that in doing so, she was following the repeated decisions and holdings of the secretary of the interior; that she was his widow, and being in that department, she must obey the law and the holdings of the department in which she was proceeding. This court would be the last in the world to advise her to defy the law as held by any department of the government in which they might be proceeding, besides she honestly believed that she was the widow of Hollen H. Fearnow. She had the advice of eminent counsel to that effect, and until this decision of the Supreme Court Commission

of Oklahoma, she had back of her every decision of every court in England and the United States, as applied to white people, that we can find since the historic contest between the common law courts of England and the Ecclesiastical Courts in which the common law courts finally put a stop to the Ecclesiastical Courts holding marriages of consanguinity void in a collateral proceeding and without a decree of nullity before the death of one of the parties to the marriage. Besides these plaintiffs had and have no right to usurp the functions of the attorney general of the United States. As repeatedly pointed out by this court, he is the proper party to protect the United States if a fraud is attempted to be perpetrated upon it, and not some private individual; and before they have any standing in court, they must show, not only that she is not entitled to the land, *but as a matter of law and fact, they are entitled to it.*

This court has held in *Bohall v. Dilla*, 114 U. S. 147, as follows:

"To entitle a party to relief against the patent of the government of the United States, he must show a better right to the land than the patentee, such as in law, should have been respected by the officers of the land department and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent."

Besides as we have seen under the express provision of the law, Hollen H. Fearnow's entry was "*void*," and when she relinquished it, she relinquished nothing. There

was nothing there to relinquish, besides as we have shown from this record, (p. 59), Hollen H. Fearnow's entry at the time of his death, had been cancelled and never re-instated.

Again, whether she relinquished his entry or filed a contest against his entry in her own individual right, was a mere matter of procedure in the department; which in no manner affected or could affect the merits; and she followed the procedure laid down by that department, as is the duty of every good citizen, and the interests of plaintiffs in error and their rights to this land, was in no manner affected by reason of this procedure. Throughout this long contest, there is no pretense, there can be no pretense, on this record that she practiced any fraud, deception or any dishonest act on anybody. Her relinquishment, her unfortunate marriage, her life, was laid bare to the register and receiver of the local office, and the commissioner of the general land office and the secretary of the interior, and through them to the president of the United States, and in the channels, and according to the rules and regulations prescribed by them, and with full knowledge of all these things and all things now presented to this court, they issued to her the patent to this land.

Counsel for plaintiffs in error will not claim, and they cannot claim, that the entry of Hollen H. Fearnow was valid, or that he had, or could ever have, any valid claim to this land; and as we have shown by the decisions of the courts, *supra*, and this is also the holding of the

land department (Emma F. Stewart's heirs, 12th Land Decision 197), those claiming under him are in no better position.

They know they could not go before the land department and acquire this land, but seem to think that there is some way by which, in the maze of technicality, these Acts of Congress may be nullified and this outrageous conduct overlooked. In this, they are clearly mistaken. To prevail in a court of equity, such as this is, they must come into court with clean hands; that they are soiled and dirty in this instance is admitted and they have come into court establishing and proclaiming it themselves.

To prevail in a court of equity, they must not only establish that the patentee is not entitled to the land, but they must show that they had made proper application to the land department for the land proceeded with their legal remedy for the land; and that they denied their rights in that department; and that they on the facts and the law were entitled to the land.

As held by the secretary, they did none of these things. The only thing they did was to file the affidavit submitted to him and set out on page 21 of the printed record. Neither in this affidavit, nor in any other manner did they ask that department to reinstate the cancelled entry of Hollen H. Fearnow. They did not ask for the land; they did not take possession of it; they did not improve it; they did not live upon it; they did not pay or offer to pay the government for the land. They neither took, nor offered to take any of the many steps or ob-

ligations required of them by law. Through all these years, since the death of Hollen H. Fearnow, up to this good hour, they have not done, nor offered to do any of the things the law requires of them to entitle them to this land. All they sought to do in this affidavit of contest, was to beat this defendant in error out of this land, to show her disqualification, if they could, and the only relief they ask is as follows, as shown by that affidavit:

"And all the allegations herein made, affiants are ready to prove at such time as may be named by the register and receiver for a hearing in said case, and we therefore ask to be allowed to prove said allegations and that said homestead entry No. 14423 may be declared cancelled and forfeited to the United States."

They have made no application for this land or assumed any obligations for it because they themselves had just succeeded in having the local land officials cancel Hollen H. Fearnow's entry on the ground of this corrupt agreement, and while that decision was set aside on the ground of defect in the notice, they knew that as long as those officials were in office, that there was no chance of them ever getting this land; but as the Supreme Court of Oklahoma in this case has held, the fact that they did not present a proper case to the land office for this land, does not relieve them in the courts from showing what they must show to the land office; namely, that on the facts and the law, they are entitled to the land.

As was held in *Parsons v. Venske*, 61 N. W. 1036, a case to declare a resulting trust in government land acquired by patent, as here, it is said:

"The *ex parte* cancellation may be in accordance with the facts. The courts do not decree that a person is entitled to the legal title, merely on the ground that the cancellation of his entry was *ex parte*, if so, then a fraudulent entryman would secure the title, merely because the department had not heard him when it cancelled the entry. If Simpkins was not a *bona fide* entryman, he could not have claimed the legal title, even though the cancellation of his entry had been made *ex parte*. By showing that he had no opportunity to be heard before the department, the entryman makes out a case for hearing in court; but as he assumes the attitude of complaining of the action of the department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must prove by evidence, that he has fully earned the same by an honest compliance with the law. The burden is on him, and it cannot be sustained without offering evidence in addition to the certificate, and its *ex parte* cancellation. After the litigant has shown that the decision ought not be conclusive upon him, because he was not and could not be heard, or for some other equally valid reason, he must still prove that the entryman has complied with the law, and has acted in good faith, because such litigant is claiming he has a right to the legal title, and these facts are indispensable to the maintainance of such claim."

If this were not so, a fraudulent entryman would secure the title merely because the department had not heard him. It will be remembered that Luttie B. Fearnow, now Jones, defendant in error, filed on this land in her own right and not as widow of Hollen H. Fearnow. She got nothing by reason of being his widow. At the time of his death, his entry was cancelled and has

never been reinstated, nor any application ever made to reinstate it. It was void, it was nothing. He died in October, 1905, and nothing was done until she filed her entry on November 28, 1906, at a time when a minute by the watch determined whether one man or another would own any particular farm, and yet these alleged heirs did nothing and the Secretary was unquestionably right in holding that even if they had a valid claim to this land, their delay would prevent them from acquiring any interest in it. They never did anything until it was apparent that the widow was going to get it and then they sought, and sought only, to beat her out of it, and not to acquire it for themselves.

They had a plain and adequate remedy at law by making the proper application to the Land Department and promising to do and doing the things required by the law in that department, to acquire this land, and make the proof that they done these things, including paying for the land; but not having done that, they can have no standing in a court of equity, or anywhere else, to claim this land.

We did not, of course, present this corrupt agreement to the department. We had no chance. By their carefully and skillfully drawn affidavit, they limited the contest to the question of the qualification of Luttie B. Fearnow, and having limited the territory and drawn the lines, they cannot justly claim they should be broader. Besides we had no opportunity, nor was there any necessity, for showing it to the department.

Counsel have set forth sixteen assignment of errors (Rec. pp. 102-122). These are so complicated and involved that we confess our inability to state them without mere repetition, but as we view them, they are in substance as follows:

1. The last decision of the Supreme Court was against its first decision and against the rights of the defendant in error.

2. The court erred in holding that the department had not erred in declining to pass on the validity of the marriage.

3. In holding that the heirs did not pursue the remedy provided by the laws of the United States.

4. In holding the unlawful and corrupt agreement of Hollen H. Fearnow and his mother, a defense.

5. The court erred in holding the plaintiff in error could introduce this agreement to defeat defendants in error's claim to the land; and that Luttie B. Fearnow, having taken the position that she was the widow of Hollen H. Fearnow, she is estopped to set up this corrupt agreement against plaintiffs in error here. Just what they did or did not do to constitute this estoppel, counsel failed to point out.

6. The court erred in holding the legality of the marriage, immaterial.

7. The court erred in holding that the register and receiver held that Fearnow was disqualified by reason of making a false purported affidavit of non-alienation.

8. The court misquoted the record as to the relinquishment.

9. The court erred in not holding that the reinstated entry of Fearnow was cancelled illegally and contrary to law at the instance of Luttie B. Fearnow.

10. The court erred in holding that defendants in error did not pursue their proper remedy.

11. The decision violates Article 6 of the United States Constitution and the Fourteenth Amendment. Just how, counsel do not point out.

12. The court erred in holding that the legality of the marriage was not material to a decision of the case.

13. The court erred in overlooking the decision of the Commissioner in the case of Barnes vs. Fearnow.

14. The court erred in confusing and mis-stating the decision of the secretary with the decision of the Commissioner in the Barnes case.

15. The court erred in not following its first decision.

16. The court erred in not holding that the secretary erred upon the admitted facts in the contest affidavit, in that under the allegations therein, the alleged heirs "plead their prior rights to consummate an entry of said land."

We respectfully submit that none of these assignments of error raised any federal question on this record. We therefore pray that this writ of error be dismissed; and that the opinion and judgment of the Supreme Court be affirmed. All of which is

Respectfully submitted,

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Counsel for Defendants in Error.

W. P. HACKNEY and
L. D. MOORE,
*Of Counsel for Defendants in Error,
The Phoenix Mutual Life Insurance Company.*

Wills Supreme Court, D. C.

FILED

APR 11 1917

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916

Emma F. Doepel et al., Heirs at Law of
Hollen H. Fearnow, Deceased,
Plaintiffs in Error,

vs.

Luttie B. Jones, Elmer Jones and The Pho-
nix Mutual Life Insurance Company,
Defendants in Error.

No. 571

**ABSTRACT AND MOTION TO AFFIRM
TRIAL COURT**

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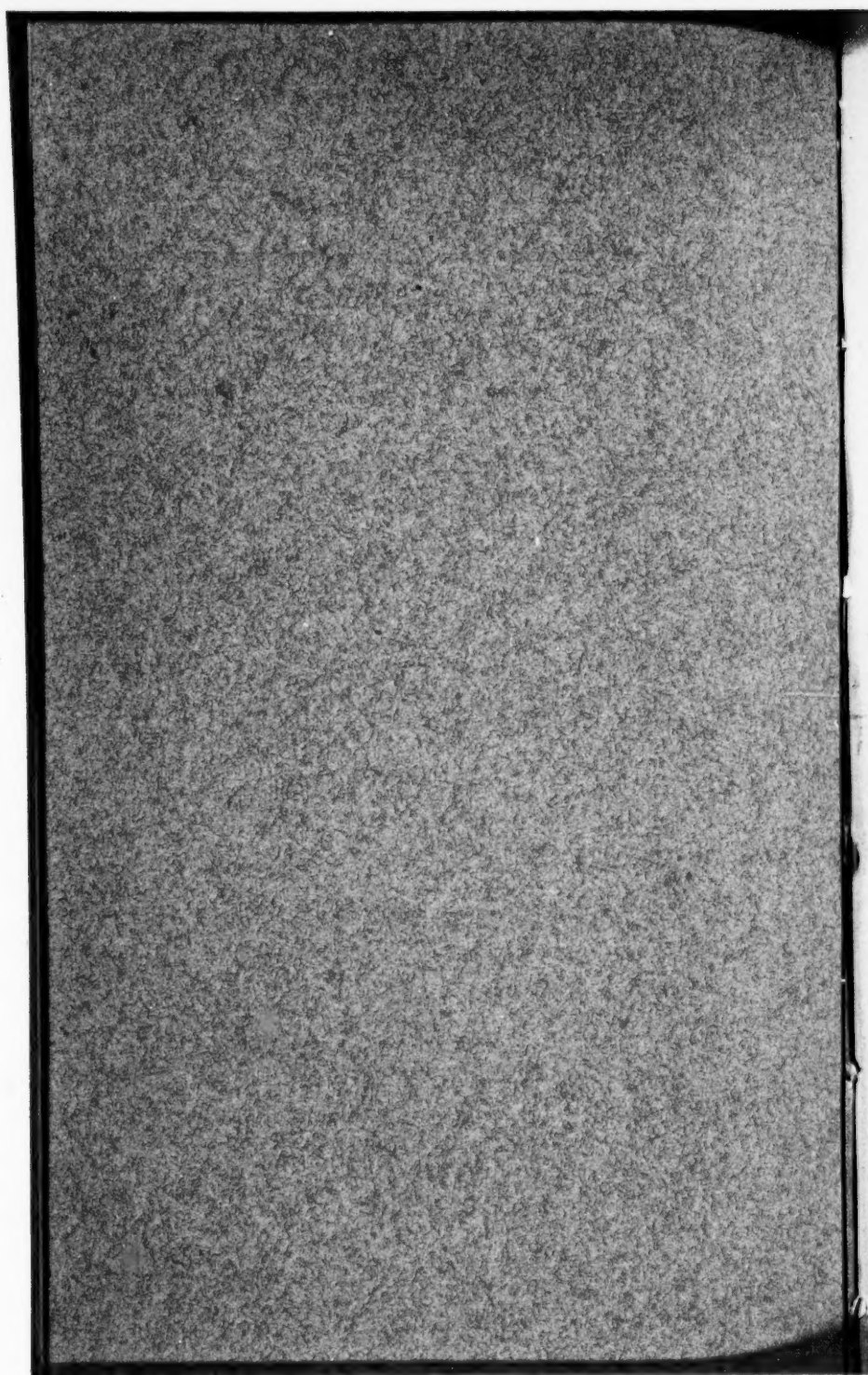
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No. 25,401



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Defendants in Error.

No. 571

**ABSTRACT AND MOTION TO AFFIRM
TRIAL COURT**

**Abstract of Record Pertinent to the Consideration of the
Pending Motions to Affirm, Dismiss, etc.**

I.

In re "Federal Question."

'Extracts from Stipulation, p. 47 printed Rec.

"It is hereby stipulated and agreed by and between the
plaintiffs and defendants in the above cause that the follow-
ing are facts and may be read in evidence in the trial of

said case by any of the said parties and on any trial between the said parties or any of them, their heirs, successors, assigns or personal representatives wherein the title to the real estate hereinafter described may be involved. The Southwest Quarter of Section Eleven (11), Township Twenty-six (26), North of Range One (1), East I. M. in Kay County, Oklahoma, was on to-wit, the 29th day of March, 1899, vacant public land, acquired under the homestead laws of the United States; * * * the said Hollen H. Fearnow on to-wit the 29th day of March, A. D. 1899, did file upon and make homestead entry No. 10171 of the said land in the proper United States Land Office, to-wit: Perry, Oklahoma; * * * and did immediately settle upon the said land and continue to occupy and improve the said land and farm the same until the — day of October, A. D. 1905, on which date he died without having made final proof therefor, or having proved up the said land.”

Extract from Assistant Commissioner Fimple’s decision in *Lena Barnes v. Hollen H. Fearnow* contest (printed Rec. 47-51):

“That on the 16th day of May, 1903, one Lena Barnes filed her affidavit of contest against the said entry of said Hollen H. Fearnow in the United States Land Office at Guthrie, Oklahoma, charging that the said land was filed on by him for the purpose of speculation, and was held for speculative purposes, and not for the purpose of making it his home, and that he was holding it fraudulently, illegally and for the use and benefit of another person, towit: Emily F. Fearnow, and that for a valuable consideration he had contracted and agreed with the said Emily F. Fearnow to prove up on said land and obtain a patent therefor, and then transfer the same to said Emily F. Fearnow, who is one of the plaintiffs in this case.

“That a trial of the said contest was had before the register and receiver of the said office, on the 10th day of August, 1903, and on the 13th day of December, 1903, the said register and receiver rendered their decision thereon, holding and adjudging that the charges in the said contest affidavit were true; that said entry was not made for the use or benefit of the said Hollen H. Fearnow, but was made for

the use and benefit of the said Emily F. Fearnow, for the consideration and in pursuance of the contract above set out, and that the entry was void from its inception, and cancelled said entry, and thereupon the said Lena Barnes was by the said register and receiver permitted to and did file on said land, and did make her homestead entry No. 13690 on September 6, 1904, of said land under the homestead laws of the United States, in said office for said land. That an appeal was taken by the said Hollen H. Fearnow from said decision to the Commissioner of the General Land Office, where, and by whom on the 20th day of January, 1905, the notice of said contest was vacated, and another hearing thereof ordered, a copy of the said findings and decision of the Commissioner is hereto attached and made a part hereof. That no appeal was taken by the said Lena Barnes from the said order and decision of the said Commissioner and no further hearing was ever had on said contest, and said contest was not revived against the heirs of Hollen H. Fearnow after his death. That on the 26th day of November, 1906, said Lena Barnes dismissed her said contest and relinquished her said homestead entry on, and to said land. That thereafter on the 28th day of November, 1906, the defendant, Luttie B. Jones, then Lena B. Fearnow, filed a relinquishment of the homestead entry of Hollen H. Fearnow, and the same was filed by her, *claiming to be the widow of the said Hollen H. Fearnow, and without the knowledge and consent of the plaintiffs in this action, or any of them, and without the knowledge and consent of the defendant R. C. Fearnow.* That thereafter and on the same day, November 28, 1906, the said Luttie B. Jones, then Luttie B. Fearnow, filed her homestead entry No. 14423 on said land, in the United States Land Office at Guthrie, Oklahoma; that at said time she was an unmarried female over the age of 21 years, a native born citizen of the United States, and was the owner of no land, nor had she at any time previous thereto been the owner of any land, nor had she at any time previous to her said entry made homestead entry upon any of the lands of the United States, and was at the time of her said entry a qualified entry woman and homesteader, under the homestead laws of the United States. That afterwards on December 12, 1906, the said plaintiffs filed their contest affidavit in said land office against the said entry of the said Luttie B.

Jones, then Luttie B. Fearnow, and that a true and correct copy of the same is attached to plaintiffs' petition, under mark of 'Exhibit A.' That on January 5th, 1907, the United States Land Office at Guthrie, Oklahoma, rejected said contest affidavit as insufficient, and rendered a decision in favor of the contestee, then Luttie B. Fearnow, now the said defendant, Luttie B. Jones, a true and correct copy of which decision is attached to plaintiffs' petition, under mark of 'Exhibit X.' That the said contestants appealed from said decision to the Commission of the General Land Office, and the said Commissioner on May 13, 1907, affirmed the said decision; a full, true and correct copy of the said decision of said Commissioner is attached to plaintiff's petition, under mark of 'Exhibit B.' That the said contestants duly appealed from the said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and on the first day of September, 1907, Jesse E. Wilson, acting Secretary of the Interior, affirmed the said decision of the Commissioner of the General Land Office, a full, true and correct copy of the said decision of the said acting Secretary affirming the said decision of the Commissioner of the General Land Office is attached to plaintiffs' petition under mark of 'Exhibit C.' That said Hollen H. Fearnow and the said Luttie B. Jones were first cousins by blood, the fathers of the said parties being brothers. That on August 26th, 1901, at Wichita, State of Kansas, the said Hollen H. Fearnow, deceased, and the said Luttie B. Fearnow were married to each other, and they were both on the said 26th day of August, 1901, residents of the Territory of Oklahoma. That the law of the State of Kansas, then in force, and now in force, is as follows, to-wit: 'All marriages between parents and children including grandparents and grandchildren of any degree between brothers and sisters of the half blood, as well as the whole blood, and between uncles and nieces, aunts and nephews, and first cousins are declared to be incestuous, and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.' Act of May 27th, 1867, Section 2. That the said Luttie B. Fearnow resided and lived with the said Hollen H. Fearnow on the said described land from the said 26th day of August, 1901, to the said date of the death of the said Hollen H. Fearnow. And she continued to reside upon and cultivate

and improve the said land from the time of the death of the said Hollen H. Fearnow up to the — day of —, 1910, and that at the time of making her final proof on the said land, she had more than the requisite amount of improvements thereon, required under the homestead laws of the United States. That the mortgage of the defendant, The Phoenix Mutual Life Insurance Company, set forth in its answer in said cause, and a copy of which is thereto attached under mark 'Exhibit B,' is unpaid in the full amount of the principal sum thereof, \$3000.00 and interest thereon at the rate of 5 per cent per annum from February 1st, 1913.

"That up to and including the time of the purchase of said mortgage by said Phoenix Mutual Life Insurance Company and the payment of \$3000.00 therefor by said company, it had no actual notice that the said plaintiffs or any of them claimed any right, title or interest in said real estate.

"That the plaintiffs are all citizens of the United States, were such at the time of the filing of the said contest and have been such at all times since.

"That immediately after making said homestead entry No. 10171 upon said premises, the said Hollen H. Fearnow went into the possession thereof and resided thereon and cultivated the same from said time, to-wit, from March 29, 1899, until said date of his death, to-wit, October 23, 1905; that during the said term of his residence thereon he made many lasting and valuable improvements upon said premises, and in said respects as to residence, cultivation and improvements fully complied with the homestead laws of the United States necessary to entitle him to make final proof and receive patent from the United States to said premises.

"That patent for said premises was issued by the United States to said Luttie B. Fearnow, now Jones, on March 15, 1909, and prior to the commencement of this action.

"That on March 29th, 1899, the date of the making of said homestead entry No. 10171 by the said Hollen H. Fearnow, that he, the said Hollen H. Fearnow, was a male citizen of the United States, more than 21 years of age; that he was the owner of no land nor had he at any time previous to said date made homestead entry upon any of the

public lands of the United States and that he was in no way disqualified from making homestead entry under the public land laws of the United States, unless the facts above noted disqualified him.

* * * * *

“That at the time of his death the father of the said Hollen H. Fearnow was dead, and that he, the said Hollen H. Fearnow, left surviving him no sons or daughters, no lineal descendants, no brothers or sisters, or lineal descendants of any deceased brothers or sisters, other than those above named.

“That all the facts admitted by the pleadings in said action to be true shall be considered by the court as facts in this action, and that all of the above mentioned facts shall be considered in connection with the pleadings in the case.”

“You (meaning the local Land Officers at Guthrie, Okla.) found the facts to sustain the charges of the affidavit of contest, and recommended that said entry be cancelled, by your decision, which is dated December 15, 1903.

“On January 5, 1904, the defendant, appearing specially, for that purpose only, filed a motion, of which the plaintiff's attorney had accepted service, to set aside all proceedings had in the case, on the ground that he had never been served with proper notice of contest therein, and, in support of said motion attached to it the paper served upon him as a copy of such notice, together with the affidavits of the officer who served the same and of himself. Said paper was identical with the original notice of contest in the case, except that it was not signed by either the register or receiver. The affidavits referred to unequivocally identified said paper as the copy of the notice of contest served upon the defendant on June 25, 1903.

“On January 21, 1904, defendant's attorney filed an affidavit in support of the motion filed on January 5, 1904, in which he alleged that he first saw said paper which purported to be a copy of the notice of contest in this case on or about September 10, 1903; that he then attempted to secure the affidavit of said W. B. Martin, who made the proof of service of notice of contest above alluded to, that the same

was the identical paper he had served upon the defendant; that said Martin was, as he understood, 'a constable, game warden and posseman or deputy marshal,' who traveled practically all of the time in the Osage and other reservations, making it difficult to 'catch' him; that on one occasion affiant had heard where Martin was and telephoned a friend to hold him there until he could arrive; that he took the first train to that point, but Martin had left about an hour before the arrival of the train; that he had stated the situation to the register of your office 'about the last of September or sometime in October,' and assured said register that diligence would be used to make up the showing in support of such motion, which had been done; that he, affiant, knew the nature of defendant's defense to this contest, and the witnesses and facts upon which the defense was based; that such defense was a meritorious one; that the case-made by the plaintiff could, as he verily believed, be completely disproved, and the fact established that the entry was made in good faith; that the witnesses who testified for the plaintiff were extremely hostile to the defendant; that his father and mother are deeply and financially interested in this contest; that his mother has instigated this case and his father defrayed part, if not all of the expenses thereof; that both of these persons are witnesses whose reputation for truth and veracity is very bad and that their neighbors will not believe them under oath.

"On January 21, 1904, you overruled the motion to set aside the proceedings herein, stating that had it been made at the time the case was called for trial, you would have sustained the same; that all defects in the notice, not set forth in the motion that day filed by defendant, had been waived by him, and that he should not be permitted at that late day to come in and set aside all of the proceedings of an expensive trial upon the ground which should have been presented when the notice was first attacked.

"Notice of your decisions of December 15, 1903, and of January 21, 1904, was served upon the defendant by registered letter, mailed to him on January 23, 1904, which he received on January 26, 1904.

"On January 26, 1904, the defendant appearing spe-

cially, for that purpose only, filed what is termed 'contestee's exception to overruling of motion.'

"On March 3, 1904, *the defendant* filed a motion for rehearing, accompanied by his affidavit that the same was made in good faith and not for the purpose of delay, and the affidavit of his attorney of record (attached to the registry receipt for the letter) that a true copy of said motion had been mailed to defendant's attorneys of record on March 2, 1904.

"On March 3, 1904, you overruled said motion for rehearing.

"On March 23, 1904, you transmitted the record in the case.

"On July 25, 1904, you reported, in response to letter 'H' of July 24, 1904, that no appeal had been filed by the defendant from your decision in this case.

"By Letter 'H' of August 18, 1904, defendant's H. E. No. 10171 was cancelled and the case closed. In said letter the facts in the case were stated, substantially, as hereinbefore set forth.

"On August 30, 1904, defendant, by his attorney of record, accepted service of notice of the decision of this office of August 18, 1904.

"On September 6, 1904, the plaintiff made H. E. No. 13690, for the land involved herein.

"On September 28, 1904, the defendant filed a motion for review of the decision of this office, dated August 18, 1904 (of which motion plaintiff's attorney of record had accepted service), upon the ground that

said decision was * * * rendered while said cause was pending in said local office, and before this contestant's time for filing an appeal had expired, and at a time when he was not otherwise apprised of the fact that the cause was pending in your Honor's office or under consideration there; that, in truth and in fact, his time for an appeal had not expired; that he had never been notified in any manner of the decision of the

local officers upon his motion for review and reconsideration of their decision upon the merits of the cause herein, which said facts appear by the record of said local office.

“Said motion for review was accompanied by the affidavit of defendant’s attorney of record that the same was made in good faith and not for the purpose of delay.

“On September 28, 1904, the date of the filing of said motion for review, the defendant filed, also, an appeal from your decision of December 15, 1903, with specification of error, of which the plaintiff’s attorneys of record had accepted service. Said appeal was indorsed by the receiver ‘Rejected because not filed in time.’

“On December 24, 1904, the plaintiff’s attorney of record filed a reply to the motion for review filed on September 28, 1904, in which he urged that inasmuch as your decision of March 3, 1904, overruling the motion for a rehearing that day filed, was rendered in open court, in the presence of defendant’s attorney, your failure to give him written notice thereof was immaterial. With said ‘reply’ was filed the affidavit of plaintiff’s attorney alleging that defendant’s attorney was present in open court, when your said decision of March 3, 1904, was rendered.

“By letter of December 27, 1904, you transmitted the motion for review and appeal, filed on September 28, 1904, and said ‘reply’ by plaintiff to such motion.

“The defendant was entitled to notice in writing of your decision denying his motion for a rehearing (Rule of Practice 17), and was not required to appeal from your decision upon the merits until such notice had been given (Rule of Practice 79). It follows that the action of this office in cancelling his entry and closing the case by letter ‘H’ of August 18, 1904, was erroneous, and said letter is hereby vacated and set aside.

“No jurisdiction of a defendant can be acquired without service upon him of notice of contest. A paper purporting to be such notice, but not signed by the register and receiver, nor by one of them, is a nullity (Rule of Practice 8). The proof of service of notice of contest in this case is the affidavit of Martin alone; his subsequent affidavit and the copy

of the alleged notice served upon the defendant leave no reason for doubt that your office was without jurisdiction to try the issues involved in this contest. The defendant waived no rights by his special appearance at the hearing of his failure to make a sufficient objection to such notice, at that time; the question of notice may be raised at any time, and when raised, or apparent upon the face of the record, cognizance must be taken thereof. *Watson v. Morgan et al.*, 9 L. D. 75; *Van Brunt v. Hammon*, 9 L. D. 561.

"I have, therefore, this day set aside all the proceedings had before you in the premises, and you are hereby directed to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690, which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. No. 10171 reinstated.

"Advise the parties in interest hereof and plaintiff of her right of appeal, and in due season report all action taken in the premises.

"Respectfully,

"J. H. FIMPLE,

"Assistant Commissioner."

(Pr. Rec. 52-53.)

"EXHIBIT A.

"Department of the Interior,

"United States Land Office at Guthrie, Oklahoma.

"Emily F. Fearnow and Emily F. Doepel, for Themselves
and on Behalf of the Other Heirs of Hollen H. Fearnow,

Deceased, Contestants,

"vs.

"Luttie B. Fearnow, Contestee.

"Involving Homestead Entry No. 14423, Covering the S. W.
¼ of Sec. 11, Tp. 26 N., R. 1 E., I. M.

"Contest Affidavit.

"TERRITORY OF OKLAHOMA,

"County of Kay, ss:

"Personally appeared before me, George B. Waltz, a

Notary Public in and for the County of Kay, Territory of Oklahoma, Emily F. Fearnow and Emma F. Doepel, of Ponca City, Oklahoma Territory, who upon their oaths say:

“That they are each well acquainted with the tract of land embraced in the Homestead Entry of Luttie B. Fearnow, No. 14423, made November 28th, 1906, for the South-Quarter of Section Eleven (11), Township Twenty-six (26) North, Range One (1) East I. M., located in Kay County, Oklahoma, and know the present condition of the same; and as ground of contest against said entry, state and allege:

“That heretofore, to-wit, on March 29, 1899, one Hollen H. Fearnow filed his Homestead Entry No. 10171 on said above described land; that on May 16, 1903, one Lena Barnes filed contest No. 3665 against the homestead entry of the said Hollen H. Fearnow No. 10171; that pending the final disposition of the said contest of the said Lena Barnes, to-wit, on October 23, 1905, the said Hollen H. Fearnow departed this life, leaving surviving him as his heirs the following persons, to-wit:

“His mother, Emily F. Fearnow, one of the affiants; his sister, Emma F. Doepel, the other affiant, both over twenty-one years of age. Also the following minor heirs, who are still living and are still minors:

“Toledo Chamberlain, age three, daughter of Nora A. Chamberlain, deceased, who was a sister of Hollen H. Fearnow, deceased; Ethel, age seventeen; Hillery Turner, age sixteen; Lester Turner, age fourteen; Cecil Turner, age thirteen, all children of Alfretta S. Turner, deceased, who was a sister of Hollen H. Fearnow, deceased; Walter Hadley, age ten, son of Ignolia Hadley, deceased, who was also a sister of Hollen H. Fearnow, deceased; Neva McGrew, age eleven; Ralph McGrew, age ten; Violet McGrew, age eight; Grace McGrew, age seven, all children of Anna M. McGrew, deceased, who was a sister of Hollen H. Fearnow, deceased. That there are no other legal heirs of the said Hollen H. Fearnow, deceased.

“That the said Hollen H. Fearnow was a single man at the time of his death and a resident of the Territory of

Oklahoma; that under and by virtue of the laws of the Territory of Oklahoma, his mother, living sister and brothers and the children of his deceased sisters, taking the share of their deceased mothers, inherit an equal share of his estate, to-wit, a one-eighth share.

“That before the death of the said Hollen H. Fearnow his said Homestead Entry No. 10171 was cancelled by virtue of the contest of the said Lena Barnes; that the said Lena Barnes made homestead entry on said above described tract of land, the same being Homestead Entry No. 13690, and made September 6, 1904; that afterwards and before the death of the said Hollen H. Fearnow, by letter ‘H,’ of January 20, 1905, from the Commissioner of the General Land Office, the said homestead entry of the said Lena Barnes was suspended and all the proceedings in the said contest set aside because of no legal service of notice of said contest on the said Hollen H. Fearnow, contestee therein, and a new hearing was ordered in said case; that before the final trial and the new hearing of the said contest said Hollen H. Fearnow died.

“Said contest of the said Lena Barnes was never at any time revived against the heirs of the said Hollen H. Fearnow, deceased, and said heirs were not made parties thereto.

“That on November 28, 1906, the said Lena Barnes dismissed said contest and relinquished all claim and title to the said Southwest Quarter of Section Eleven (11), Township Twenty-six (26) North, Range One (1) East I. M., the land covered by her said Homestead Entry No. 13690. That as against these affiants and the other heirs of the said Hollen H. Fearnow, deceased, the said Lena Barnes had no right, title or claim to the said above described land because she failed and neglected to revive said contest against said heirs and had in fact no right or claim to relinquish.

“That on November 28, 1906, *the contestee herein, Luttie B. Fearnow, claiming to be the widow of the said Hollen H. Fearnow, deceased*, without the knowledge or consent of these affiants or the other heirs of the said Hollen H. Fearnow, filed in the United States Land Office at Guthrie, Oklahoma, a purported relinquishment, of the said

homestead entry of the said Hollen H. Fearnow, made March 29, 1899, No. 10171, covering the Southwest Quarter of Section Eleven (11), Township Twenty-six (26) North, Range One (1) East of the I. M.; that said relinquishment is null, void and of no effect as against the heirs of the said Hollen H. Fearnow, deceased. That at the same time and place the said Luttie B. Fearnow filed her Homestead Entry No. 14423 on the land above described; *that the said homestead entry is null and void because of the rights of the heirs of the said Hollen H. Fearnow; that said rights could not be relinquished by the said Luttie B. Fearnow, and her attempted entry made in her own right should be cancelled.*

“Affiants further say that the contestee, Luttie B. Fearnow, claims to be the widow of Hollen H. Fearnow, deceased, but affiants allege the facts to be that on August 26, 1901, at Wichita, State of Kansas, the said Hollen H. Fearnow, deceased, and Luttie B. Fearnow, contestee, went through a pretended marriage ceremony; that at the time of said pretended marriage said parties were residents of the Territory of Oklahoma; that the said Hollen H. Fearnow and the contestee, Luttie B. Fearnow, were first cousins by blood, the fathers of the said parties being brothers; that both the laws of the Territory of Oklahoma and of the State of Kansas, at the time of said marriage, and at this time, prohibit the marriage of first cousins by blood and declare said marriages to be incestuous and absolutely void. The law of Kansas then and now in force being as follows, to-wit:

“‘All marriages between parents and children, including grandparents and grandchildren of any degree, between brothers and sisters of the one-half blood as well as the whole blood, between uncles and nieces, aunts and nephews, and first cousins, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.’ Act May 27, 1867, Section 2.

“The law of Oklahoma then and now in force was and is as follows, to-wit:

“‘Marriages between parents and children, ancestors

and descendants of any degree, of a stepfather with a step-daughter, a stepmother with a stepson, between uncles and nieces, aunts and nephews, between brothers and sisters of the half as well as the whole blood, father-in-law and daughter-in-law, mother-in-law and son-in-law, and first cousins, are declared to be incestuous, illegal and void and are expressly prohibited.'

"Affiants further allege that the contestee, Luttie B. Fearnow, pretending and claiming to be the widow of Hollen H. Fearnow, deceased, is now and has been continuously since the death of Hollen H. Fearnow, on October 23, 1905, forcibly holding possession of the above described land against the rights and claims of the lawful heirs of the said Hollen H. Fearnow, deceased.

"Affiants make this affidavit and bring this contest on behalf of themselves and all the other heirs of the said Hollen H. Fearnow, deceased.

"And all the allegations herein made, affiants are ready to prove at such time as may be named by the register and receiver for a hearing in said case, and we therefore ask to be allowed to prove said allegations, and that said Homestead Entry No. 14423 may be declared cancelled and forfeited to the United States, they, the said contestants, paying the expense of such hearing.

"EMILY F. FEARNOW,

"EMMA F. DOEPEL.

"Subscribed and sworn to before me this 5th day of December, 1906.

GEO. B. WALTZ,

(Seal)

"Notary Public.

"My commission expires Nov. 20, 1909.

"Paul Doepel also appeared at Ponca City, O. T., who, being duly sworn, deposes and says:

"That he is acquainted with the tract of land above described in the affidavit of Emily F. Fearnow and Emma F. Doepel, and knows that the statements made therein are true.

PAUL DOEPEL.

"Subscribed and sworn to before me this 10th day of December, 1906.

C. H. HOLLOWAY,

(Seal)

"Notary Public.

"My commission expires Nov. 29, 1908."

Extract from Exhibit "B" of plaintiffs' petition:

"EXHIBIT B.

" 'H.'

Department of the Interior,
General Land Office,

"J. L. M.

"Washington, D. C., May 13, 1907.

"Doc. —. Case 2346.

"Emily F. Fearnow and Emma F. Doepel, for Themselves
and Other Heirs of Hollen H. Fearnow,

"vs.

"Luttie B. Fearnow, Now Jones.

"*Contest Dismissed. Affirmed.*

"Register and Receiver, Guthrie, Oklahoma.

"Sirs: November 28, 1906, Luttie B. Fearnow made
H. E. No. 14423 for S. W. $\frac{1}{4}$, Sec. 11, T. 26, R. 1.

"December 12, 1906, Emily F. Fearnow and Emma F. Doepel, for themselves and other heirs of Hollen H. Fearnow, filed a contest against said entry, alleging, in substance, that on March 29, 1899, one Hollen H. Fearnow made H. E. No. 10171 for the S. W. $\frac{1}{4}$, Sec. 11, T. 26, R. 1, against which one Lena Barnes filed her contest, and pending which contest the entryman on October 23, 1905, died, leaving surviving him as heirs, Emily F. Fearnow, his mother; Emma F. Doepel, his sister; Royal C. and Richard T. Fearnow, brothers of the deceased entryman, and the minor children of three deceased sisters of the entryman, names given; that said entryman was a single man at the time of his death; that before the death of the said Hollen H. Fearnow his entry was cancelled by reason of the contest of Lena Barnes, and that said Barnes on September 6, 1904, made H. E. No. 13690 for the land; that after the death of Fearnow the contest of Barnes was by decision 'H' of January 20, 1905, set aside because of defective service of notice and a new hearing was ordered; that the contest was never revived against the heirs; that on November 28, 1906, Barnes dismissed the contest, relinquished her entry and on the same day Luttie B. Fearnow, claiming to be the

widow of Hollen H. Fearnow, filed her relinquishment of H. E. No. 10171, made by Hollen H. Fearnow March 29, 1899, and was allowed to make H. E. No. 14423 for the land in her own name; that said entry is null and void because of the rights of the heirs of Hollen H. Fearnow; that the rights of the said heirs could not be relinquished by said Luttie B. Fearnow, now Jones; that on August 26, 1901, at Wichita, Kansas, said Hollen H. Fearnow, deceased, and Luttie B. Fearnow, now Luttie B. Jones, went through a pretended marriage ceremony; that at the time of the said pretended marriage said parties were living in the Territory of Oklahoma; that said parties were first cousins by blood, the fathers of said parties being brothers; and both the laws of Kansas and of Oklahoma at the time of the said marriage prohibited the marriage of first cousins by blood and declared such marriage to be absolutely void (here is inserted the marriages [statutes] of the States in regard to marriages of first cousins); that the said Luttie B. Jones, formerly Fearnow, pretending and claiming to be the widow of the deceased Fearnow, is now and has been continuously holding possession of the land against the rights and claims of the lawful heirs, all of which matters the heirs are ready to furnish proof of and ask that a hearing be ordered.

“January 5, 1907, you rejected the contest, citing as authority therefor the case of *McMartin vs. Sportsman* (22 L. D. 263), and the unreported decision of the department dated July 19, 1901, in the case of *George Smothers vs. Lizzie Mitchell*.

“In the case of *Smothers vs. Mitchell*, the allegation was that Mrs. Mitchell at the time of her marriage to Luke Mitchell was the wife of one Waldruf, and in that case, as in this, the contest was brought by parties claiming to be the heirs of the deceased entryman.

“In dismissing the contest in said case, the ruling in the case of *MacMartin vs. Sportsman*,

“*‘That no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department could not question the validity of the marriage on the protest filed,’ was cited.*

"As the homestead herein devolved upon the widow under the federal statute, *Mrs. Fearnow had the right to relinquish the same and make the entry in her own name*, and your action rejecting the contest on the charge that her marriage to the deceased entryman was not valid, was correct and is hereby affirmed with right of appeal.

"So advise the parties and in due time report action taken.

"Respectfully,

"R. A. BALLINGER, *Commissioner*.

"T. W. AKIN."

Extract from Exhibit "C" of plaintiffs' petition:
Pr. Rec. 20-23.)

"EXHIBIT C.

"H. S. B. Department of the Interior, E. F. B.
"D. 921. Washington, Sept. 1, 1907.

"Emma F. Doepel et al.

"vs.

"Luttie B. Jones, now Fearnow.

"*Appeal*.

"The Commissioner of the General Land Office.

"Sir: This appeal is filed by Emma F. Doepel and others as heirs of Hollen H. Fearnow, from the decision of your office of May 13, 1907, dismissing their contest against the homestead entry of Luttie B. Jones for the S. W. ¼, Sec. 11, T. 26 N., R. 1. E., Guthrie, Oklahoma.

"The contestants are the mother, the sister and the brothers of Hollen H. Fearnow, who made entry of the land March 29, 1899, but whose entry was cancelled upon the contest of Lena Barnes, the contestant Barnes on September 6, 1904, made entry of the land. Fearnow died October 23, 1905, and after his death the decision cancelling his entry was vacated January 20, 1905, and a new hearing was ordered upon the contest of Barnes against the Fearnow entry. November 28, 1906, Barnes dismissed her contest, relinquished her entry and on the same day Luttie B. Fearnow, as widow, filed a relinquishment of Hollen H. Fear-

now's entry and was allowed to make entry of the land in her own right.

"The contestants allege that the entry of Luttie B. Fearnow is null and void for the reason that her pretended marriage with Hollen H. Fearnow was invalid; this is a question the department cannot determine from the record before it. But independent of this contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow, and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right it would be necessary to reinstate that entry and to show that it was improperly cancelled, not by reason of any technical objection in the procedure, but upon its merits. Furthermore, their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry.

"Your decision is affirmed, and the papers are returned herewith.

"Very respectfully,
(Signed) "JESSE E. WILSON,
"Acting Secretary."

Exhibit "X" of plaintiffs' petition:

"EXHIBIT X.

"Jan. 5, 1907.

"Rejected for the reason that the allegations of the affidavit of contestee are insufficient under rule in case of George W. Smothers vs. Lizzie Mitchell, widow of Luke Mitchell, deceased (unreported). Inv. N. E. 1/4, Sec. 27, Tp. 28, Range 1 East. Hon. Secretary's decision of July 19, 1901. And also rule in case McMartin vs. Sportsmans, 22 L. D. 263. Thirty days allowed to appeal.

"L. H. HOUSTON, *Register*.

"WILLIAM B. HODGE, JR., *Receiver*."

(Pr. Rec. 25-26.)

Extract from former decision by Supreme Court of Oklahoma (opinion by Ames, C.):

“AMES, C.:

“The trial court sustained a demurrer to plaintiffs’ petition, and this proceeding is brought to review that ruling. The facts alleged in the petition are, that one Hollen H. Fearnow, on March 29, 1899, made a homestead entry upon the land involved; that he thereupon took possession of the land, resided thereon, cultivated it and made improvements for a period of more than five years and until his death in October, 1905; that in November, 1906, one Luttie B. Jones, one of the defendants, claiming to be his widow, relinquished his homestead entry, filed her homestead entry upon the same land, and subsequently secured patent therefor; that in December, 1906, the plaintiffs filed their contest affidavit before the land office, alleging that Luttie B. Jones was not the widow of Hollen H. Fearnow. The facts alleged in this respect are, that Luttie B. Jones and Hollen H. Fearnow were residents of the Territory of Oklahoma in August, 1901; that at that time they were first cousins by blood; that they went to Kansas, where a marriage ceremony was performed; that under the laws of Kansas, as well as those of Oklahoma, this marriage was incestuous and void; that immediately they returned to the Territory of Oklahoma; and that Mrs. Jones’ right to relinquish Fearnow’s entry rested entirely upon this void marriage. In January, 1907, the land office at Guthrie rejected the contest for the reason that it would not inquire into the validity of the marriage. Appeal was taken to the Commissioner of the General Land Office, where the decision was affirmed. Appeal was then taken to the Secretary of the Interior, where the decision of the Commissioner was affirmed. Thereafter, when patent had issued to Mrs. Jones, the heirs of Fearnow brought this suit to declare a resulting trust. The statute of Kansas in force at the time of this marriage provides:

“All marriages between parents and children, including grandparents and grandchildren of any degree, between brothers and sisters of the one-half blood as well as the whole blood, and between uncles and nieces, aunts and

nephews, and first cousins, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.'

"The law of Oklahoma then in force provides (Sec. 3483, Wilson's Rev. and Ann. St.):

" 'Marriages between parents and children, ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with a stepson, between uncles and nieces, aunts and nephews, between brothers and sisters of the half as well as the whole blood, father-in-law, mother-in-law and son-in-law and first cousins are declared to be incestuous, illegal and void, and are expressly prohibited.'

"Section 2276 of Wilson's Rev. and Ann. St. is as follows:

" 'Persons who, being within the degree of consanguinity within which marriages are by the law of the Territory declared incestuous and void, intermarry with each other, or commit adultery or fornication with each other, are punishable by imprisonment in the Territorial prison not exceeding ten years.'

"The questions which arise in the case are whether this widow is entitled to the homestead of Fearnow, or whether the plaintiffs, his heirs, are entitled to it.

"It will be remembered that Fearnow had resided on the land more than five years prior to his death. Although he had not made his final proof, he had resided upon the land long enough to entitle him to make it. 'The right of a patent once vested is treated by the government, in dealing with public lands, as equivalent to a patent issued.' *Stark vs. Starr*, 6 Wall. 402, 18 L. Ed. 925; *Hays vs. Wyatt* (Idaho), 115 Pac. 13, 16. Sec. 2291 of the Revised Statutes, providing for the disposition of a homestead entryman's rights upon his death, is as follows:

" 'No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case

of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in Section Twenty-two Hundred and Eighty-eight, and that he, she or they will bear true allegiance to the government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.'

"It will thus be seen that if Mrs. Jones is the widow, she is entitled to the land, while if she is not the widow, his other heirs would be entitled to it.

"It is apparent that if she was not the widow she had no right to relinquish Fearnow's entry, and that she could acquire no right against his heirs by relinquishing and entering the land herself, as by the statute the heirs had two years within which to make proof, and during that time she could not acquire any rights adverse to them. The Atchison, Topeka & Santa Fe Railroad Company vs. Frederick Pracht, 20 Kan. 66. It is likewise true that if the land department committed error of law, that the courts will declare a trust where the true beneficiaries have protected their rights before the department. Baldwin vs. Keith, 13 Okl. 624; Ross vs. Stewart, 25 Okl. 611. * * *

"In our opinion this marriage is void, and not merely voidable. The law of Kansas, where the marriage was consummated, declared it to be 'incestuous' and absolutely void. The law of Oklahoma, in which the parties both resided, declared it to be 'incestuous, illegal and void,' and provided that it should constitute an offense 'punishable by imprisonment in the Territorial prison not exceeding ten years.' Incest is intercourse between people related within the degrees prohibited, and it seems clear to our minds that it was the purpose of the Legislature in declaring such marriages incestuous and absolutely void, and providing that the relation should be punishable by imprisonment for ten years, to prevent such marriages, and that it did prevent them.

and that any marriage pretended to be consummated in violation of these statutes is, as declared by the statute, not only void, but incestuous. In *Hunt vs. Hunt*, 23 Okl. 490, 100 Pac. 541, it was held that a marriage between a boy under eighteen and a girl under fifteen was voidable and not void, although it was prohibited by statute, but in that case the statute did not declare the marriage to be 'incestuous, illegal and void.' The section there construed was 3484 of Wilson's Rev. and Ann. St., and immediately follows Section 3483, which is now under consideration, and the concluding proviso of Section 3484 lends weight to the conclusion which we reach with reference to Section 3483. It is as follows: 'Provided, that this section shall not be construed to prevent the courts from authorizing the marriage of persons in settlement of suits for seduction or bastardy, when such marriage would not be incestuous under this act,' thus indicating that marriages prohibited as incestuous by Section 3483 would not be recognized or tolerated in the State under any circumstances, even in settlement of suits for seduction or bastardy. We recognize the danger of undertaking to lay down a general rule, but it seems to us that it is not far wrong to say that a marriage may be considered voidable when it is possible under any circumstances for the plaintiffs to contract the marriage, or subsequently to ratify it, while it should be considered void if it is impossible for them under the law to contract it, and if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that it is void. As said by the court in *State vs. Yoder*, 130 N. W. 10 (Minn.): 'And in this connection it may be safely said that a marriage is not absolutely void in any case not expressly so declared by law, when by the subsequent conduct of the parties it may be ratified, confirmed or made valid by cohabitation.' Our conclusion that the marriage in this case is void is supported by the following decisions: *Blaisdell vs. Bickum*, 139 Mass. 250; *Lanham vs. Lanham*, 136 Wis. 360; *Wilbur's Estate vs. Bingham*, 8 Wash. 35, 35 Pac. 407; *Moore vs. Moore* (Ky.), 98 S. W. 1027; *Hayes vs. Rollins* (N. H.), 44 Atl. 176; *In re Gregorson's Estate* (Cal.), 116 Pac. 60.

"The next proposition stated by counsel for defendant

is, that even though the marriage is void, its validity cannot be inquired into in this proceeding seeking to declare a trust.

"If this were true, it would follow that this woman, notwithstanding the fact that she was not the lawful widow of Fearnow, could keep this land without the fact of her relation to him being inquired into by any tribunal. THE LAND OFFICE HAS DECLINED TO MAKE INQUIRY INTO THE FACT, AND IF THE COURTS SHOULD LIKEWISE REFUSE, THEN THE HEIRS, WHO ARE IN LAW ENTITLED TO THE ESTATE, WOULD BE DEPRIVED OF IT WITHOUT HAVING THEIR DAY IN COURT. In re Gregorson's Estate (Cal.), 116 Pac. 60, 62, it is said in the opinion:

"A marriage prohibited as incestuous or illegal and declared to be "void" or "void from the beginning," is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material.'

"In Newland's Estate, 231 Pa. St. 313, 314, 80 Atl. 255, it is said:

"The nullity of a void marriage may be shown in any legal proceeding where it is a pertinent matter. Heffner vs. Heffner, 23 Pa. 104; Thomas vs. Thomas, 124 Pa. 646, 17 Atl. 182; Wayne Twp. vs. Porter Twp., 138 Pa. 181, 20 Atl. 939; Clerk's Estate, 173 Pa. 451, 34 Atl. 68; Divvers' Estate, 22 Pa. Supr. Ct. 436.'

"Fornhill vs. Murray, 1 Bland (Md.) 479, and Medlock vs. Merritt (Ga.), 29 S. E. 185, support the same conclusion.

"Clerk vs. Barney, 24 Okl. 455, 103 Pac. 598, is a case in which an attack was made upon the marriage in a proceeding to determine the distribution of the property of the deceased husband, but in that case the exact point was not considered, it apparently being conceded by counsel.

"The third proposition involved, as expressed by the defendants, is, that as the land department has found the facts against the plaintiffs, that they will not now be heard to question its decision.

"It is, of course, true that the findings of fact in the

land department are generally accepted as true by the courts, but in this case no evidence was heard, and there are no findings of fact. The register and receiver of the local land office a few days after the contest affidavit was filed by the plaintiffs, rejected it on the ground that it was insufficient under the rule of the cases of Smothers vs. Mitchell and MacMartin vs. Sportsman, 22 Land Decisions 263.

“We do not have access to the unreported case of Smothers vs. Mitchell, but the case of MacMartin vs. Sportsman does not sustain the position of the defendants in this case, because there the conclusion was based upon the idea that ‘the laws of Oklahoma limit the institution of proceedings to annul a marriage, on the ground alleged in this case, to the parties themselves during the lifetime of both, or to the former wife (Statutes of Oklahoma 1890, Sections 3371 and 3372).’ An examination of those sections discloses that they do not apply to a case where the marriage is incestuous and void because of the relation between the parties, and in addition to this, those sections seem to have been omitted in the revision of 1893 (Chap. 49 of the Statutes of 1893), and the revision of February 26, 1897 (Chap. 51 of Wilson’s Rev. and Ann. St.) The decision of the register and receiver was affirmed by the commissioner upon the same ground, and manifestly that was the only proposition involved in the contest and on the appeal to the Secretary of the Interior, and as the contest was in the form prescribed by the land office, what is said in the Secretary’s opinion beyond the issue raised manifestly cannot add anything to the record itself.

“For the error in sustaining the demurrer to the petition, the case should be reversed and remanded.

“Aug. 20, 1912. By the court: Adopted in whole.”
(Pr. Rec. 1-6.)

Extract from last decree by the trial court in plaintiffs’ favor:

“It is therefore considered, ordered, adjudged and decreed that the plaintiffs and the defendant, R. C. Fearnow, are the sole and only heirs of Hollen H. Fearnow, deceased,

the homestead entryman mentioned in plaintiffs' petition; that the plaintiffs and the defendant, R. C. Fearnow, are the owners in fee simple of the premises described in plaintiffs' petition, to-wit:

"The Southwest Quarter (S. W. $\frac{1}{4}$) of Section Eleven (11), Township Twenty-six (26), North of Range One (1), East of the Indian Meridian, in Kay County, State of Oklahoma; and that the defendant, Luttie B. Jones, holds the legal title to the same in trust for the said owners thereof.

"That the said Emily F. Fearnow, Emma F. Doepel, R. C. Fearnow, Richard T. Fearnow, Toledo Chamberlain and Walter D. Hadley each own an undivided one-eighth (1-8) of said described premises, and that the said Neva McGrew, Grace McGrew, Ralph McGrew, Violet McGrew, Ethey Turner, Hilary Turner, Lester Turner and Cecil Turner each owns an undivided one thirty-second (1-32) of said premises.

"It is further considered, ordered, adjudged and decreed that the defendants, Luttie B. Jones and Elmer Jones, shall make a good and sufficient deed conveying said premises to said owners thereof.

"It is further considered, ordered, adjudged and decreed that the mortgage given by the defendants, Luttie B. Jones and Elmer Jones, to P. H. Albright, dated August 1, 1908, and filed for record August 1, 1908, in the office of the register of deeds of Kay County, Oklahoma, and recorded in said office in Book 34 of mortgages, at page 87, which said mortgage was afterward, to-wit, on the first day of September, 1908, assigned by said P. H. Albright to the defendant, the Phoenix Mutual Life Insurance Company, does not constitute any lien or incumbrance upon said premises and that said mortgage be cancelled, set aside and held for naught.

"It is further considered, ordered, adjudged and decreed that the plaintiffs have and recover from the defendants, Luttie B. Jones, Elmer Jones and the Phoenix Mutual Life Insurance Company, the costs of this suit, taxed in the sum of \$.....

"W. M. BOWLES, *Judge.*

“Endorsed: No. 3900. Fearnow vs. Jones, Jr. Entry. April 21, 1913. Filed Oct. 28, '13. Fred C. Groshong, Clk.”
(Pr. Rec. 62-63.)

/

“Journal Entry.”

“Now on this 15th day of September, A. D. 1913, the same being one of the regular judicial days of the September term, 1913, of said court, the motion for a new trial heretofore filed in said cause by the said defendants, Luttie B. Jones and Elmer Jones, came on regularly to be heard on the regular call of the docket. The said plaintiffs appeared by their attorney, L. A. Maris, and the said defendants, Luttie B. Jones and Elmer Jones, appeared by their attorney, J. F. King, and thereupon the said motion for a new trial was read and presented to the court; and after the argument of counsel, and the court being fully satisfied in the premises, the court finds that said motion should be overruled.

“It is therefore by the court considered and ordered that the motion for a new trial of Luttie B. Jones and Elmer Jones in said cause be, and the same is hereby overruled; to which the said Luttie B. Jones and Elmer Jones each at the time separately except. Thereupon the motion for a new trial heretofore filed in said cause by the said defendant, the Phoenix Mutual Life Insurance Company, came regularly on to be heard on said 15th day of September, 1913. The said plaintiffs appeared by L. A. Maris, their attorney, and the said Phoenix Mutual Life Insurance Company appeared by J. F. King and Hackney & Lafferty, its attorneys. After the reading of said motion for a new trial to the court and the presentation of the same, the court finds that said motion for a new trial of the Phoenix Mutual Life Insurance Company should be overruled.

* * * * *

“Execution is stayed thirty days, within which time the execution of the judgment and decree herein may be stayed pending the determination of said cause in the Supreme Court as to said Luttie B. Jones and Elmer Jones by depositing with the clerk of the court a good and sufficient deed conveying to plaintiffs all the right, title and

interest in the lands involved herein, which was held by the said Luttie B. Jones and Elmer Jones at the commencement of this action; said deed to be delivered to the said plaintiffs upon and in the event of the affirmance of the judgment and decree herein by the Supreme Court.

“Execution as to said defendant, Phoenix Mutual Life Insurance Company, of the judgment and decree herein is stayed thirty days, within which time the execution of the judgment and decree herein may be further stayed until the final determination of said cause by the Supreme Court by the said Phoenix Mutual Life Insurance Company depositing with the clerk of this court a release of its mortgage mentioned in the judgment and decree herein, or by executing to the plaintiffs herein a good and sufficient bond in the sum of \$6,000.00, with P. H. Albright as principal and C. A. Johnson and Grant Stafford as sureties; that the said Phoenix Mutual Life Insurance Company will abide the judgment herein if the same shall be affirmed by the Supreme Court.

“W. M. BOWLES, *Judge.*

“O. K.

“L. A. MARIS,

“*Attorney for Plaintiffs.*

“O. K.

“HACKNEY & LAFFERTY,

“*Attorneys for Phoenix Mutual Life Insurance Company.*

(Pr. Rec. 66-67.)

“J. F. KING,

“*Attorney for Luttie B. Jones and Elmer Jones.*

“Endorsed: No. 3900. Fearnow vs. Jones. Jr. Entry, Sept. 15, 1913. Filed Oct. 28, 1913. Fred C. Groshong, Clerk.”

(Pr. Rec. 67.)

Syllabi from last decision by Oklahoma Supreme Court reversing the trial court and entering a decree against the heirs as donees under Sec. 2291, U. S. Rev. Stats.:

“It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be

and the same is hereby reversed and the cause remanded, with directions to set aside the decree *in toto* and to enter a judgment in favor of the defendant, Luttie B. Jones. Opinion by Kane, C. J. All the justices concur.

("Filed Feb. 8, 1916. William M. Franklin, Clerk.)
(Pr. Rec. 72.)

"In the Supreme Court of the State of Oklahoma.

"No. 5978.

"Luttie B. Jones and Elmer Jones, Plaintiffs in Error,

"vs.

"Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel, and Emily F. Fearnow, as Next Friend for Toledo Chamberlain, Walter D. Hadley, Neva McGrew, Grace McGrew, Violet McGrew, Ralph McGrew, Hilary Turner, Lester Turner, Cecil Turner and Richard T. Fearnow, Infants; the Phoenix Mutual Life Insurance Company, a Corporation, and R. C. Fearnow, Defendants in Error.

"1. The United States Land Department primarily is entrusted with the disposal of the public domain, and the action of its officers will not be inquired into in the courts, unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, and that as a result thereof the patent was issued to the wrong party.

"2. F. filed a homestead entry upon a tract of unoccupied public land and died before making his final proof. Thereafter J., a qualified homestead entryman, in her own right, presented to the proper officers of the land department a relinquishment of said entry and an application to enter said land, which were accepted, and her homestead entry placed of record. Thereafter the heirs of F. filed a contest against the homestead entry of J., wherein they alleged that her homestead entry was void, on account of certain alleged false statements of said entryman to the effect that she was the wife of F., the original entryman, which contest was rejected, the officers of the local land office and the Commissioner of the General Land Office

holding that no adjudication of the nullity of the marriage having been made by any court of competent jurisdiction, the department could not question the validity of the marriage, the Secretary of the Interior further holding: (1) That this is a question the department cannot decide from the record before it; (2) that independent of this, the contestants presented no ground upon which their contest can be sustained; and (3) that their delay in proceeding to contest, pursuant to Section 2291, Rev. Stat. U. S. (Comp. 1901, p. 1390), is sufficient reason for rejecting their contest. Thereafter J. submitted her final proof before the land department, whereupon a patent to said land in due form was issued to her by the United States. Thereafter in a suit in equity commenced by the heirs of F. against J. for the purpose of declaring a resulting trust upon the ground 'that the Department of the Interior committed error in said decisions and all of them in refusing to permit these plaintiffs (the heirs of F.) to show that said Luttie B. Jones, then Fearnow (J.), the defendant herein, was not the wife of the said Hollen H. Fearnow (F.), deceased,' the foregoing facts were agreed upon by the parties. Held: (1) That inasmuch as J. did not assert any right to the land as the widow of F., or procure the issuance of the patent pursuant to Section 2291, Rev. Stat. U. S., the decisions of the officers of the land department in declining to pass upon the validity of the marriage of F. and J. were not erroneous; (2) that the claim of the heirs resting upon their relationship with E., they are not entitled to the relief prayed for, because they did not pursue their remedy before the land department, pursuant to Section 2291, Rev. Stat. U. S.; (3) That, granting the heirs can make their final proof and present the affidavits, etc., required by Section 2291 before the court, then the agreement of the parties as to the speculative nature of the homestead entry of F. should also be considered, and in that event they would be no better off; (4) that the heirs of F. are not entitled to the relief prayed for upon any theory which may be properly predicated upon the record and agreed statement of facts before us.

“(Syllabus by the court.)”

(Pr. Rec. 72-73.)

Extracts from assignment of errors:

"In the Supreme Court of the State of Oklahoma.
"(Filed Feb. 23, 1916. William M. Franklin, Clerk.)

"No. 5978.

"Luttie B. Jones and Elmer Jones, Plaintiffs in Error,
"vs.

"Emily F. Fearnow, Ethel T. Turner, Emma F. Doepel,
and Emily F. Fearnow, as next Friend for Toledo
Chamberlain, Walter D. Hadley, Neva McGrew, Grace
McGrew, Ralph McGrew, Violet McGrew, Hilary Turner,
Lester Turner, Cecil Turner, and Richard T. Fearnow,
Infants, and the Phoenix Mutual Life Insurance Com-
pany, a Corporation, and R. C. Fearnow, Defendants in
Error.

"Petition for a Rehearing.

"Come now the defendants in error, other than the
Phoenix Mutual Life Insurance Company, and respectfully
represent to the court that on the 8th day of February,
1916, a decree and judgment was rendered by it in said
cause erroneously reversing the judgment of the District
Court of Kay County, remanding said cause to said court
and instructing and directing said court to render judgment
in said cause in favor of the plaintiff in error, Luttie B.
Jones, and against defendants in error, who hereby apply
for a rehearing herein, for that said decision overlooked
vital questions and decisions decisive of the case, as follows,
to-wit:

No. 1:

"The court overlooked the portion of the former opinion
in this case reported as the case of Emily F. Fearnow et al.
vs. Luttie B. Jones et al., in 34 Okl. 694, wherein this court,
speaking through Judge Ames, then Supreme Court Com-
missioner, held that Luttie B. Fearnow never was the wife
of Hollen H. Fearnow, the original homestead entryman of
the land in controversy in this action, and in that con-
nection this court overlooked the law, that not being the
wife of the homestead entryman, she had no right to make
a release of the homestead entry of said Hollen H. Fear-
now. And hence, overlooked the point and law that the said
release upon the facts as to the successors to said Hollen H.

Fearnow did not embrace the said Luttie B. Fearnow, and that she had no right to release said homestead entry of said Hollen H. Fearnow, and had no right to make a homestead entry upon said premises in her own name to the prejudice of the rights of the real successors of said Hollen H. Fearnow, under Sections 2291 and 2292 of the Revised Statutes of the United States, and overlooked the fact that the said heirs of the said Hollen H. Fearnow were the real beneficiaries of the real donee right under said sections of the Rev. Stat. of the United States to consummate an entry of said land, not under the laws of descent and distribution of the State of Oklahoma, but under the provisions of the said sections of the Rev. Stat. of the United States.

“And, so overlooking the above matters in their proper relationship each to the other, this court has overlooked a question decisive of the case, viz., that the U. S. General Land Office and the Department of the Interior erred as a matter of law in not ordering a hearing and upon the undisputed facts relative to the said Luttie B. Jones being or not being the wife of Hollen H. Fearnow and the law relative thereto deciding that she was not the widow, and therefore not entitled to either relinquish the homestead entry of Hollen H. Fearnow or to make an entry of said land after such void relinquishment for her individual use and benefit under the said sections of the said Rev. Stat. of the U. S., as the entry of said Hollen H. Fearnow was made.”
(Pr. Rec. 81-82.)

No. 2:

“It appears from page 6 of the opinion in this case that the court has overlooked the stipulation and agreed statement of facts set forth at page 35 of the record, wherein it is specifically set forth as follows:

“That thereafter, on the 28th day of November, 1906, the defendant, Luttie B. Jones, then Luttie B. Fearnow, filed a relinquishment of the homestead entry of Hollen H. Fearnow, and the same was filed by her, claiming to be the widow of the said Hollen H. Fearnow, and without the knowledge and consent of the plaintiffs in this action, or any of them, and without the knowledge and consent of the defendant, R. C. Fearnow.”

“In connection with this the court’s conclusion on page 6 of opinion is as follows:

“‘It is quite deficient when it attempts to disclose the exact facts immediately surrounding the acceptance by the land department of the relinquishment and the application to make homestead entry presented by Luttie B. Fearnow. Neither the relinquishment nor the application to enter said land presented by Luttie B. Fearnow is before us.’

“And so overlooking said matters set forth at page 35 of the record this court was misled into its conclusion in said opinion as to the question of said purported widow’s relinquishment and the legal effect thereof, and thereby this court erred in its conclusion by failing to conclude that the aforesaid relinquishment was void. * * *”

(Pr. Rec. 82.)

No. 3:

“* * * And the court has overlooked the fact that the heirs could not make an entry until the illegal entry accorded to Luttie B. Fearnow had been cancelled and that said contest method was the only way provided by the rules of practice of the U. S. Land Office and Department of the Interior of ridding the records of an entry fraudulently or illegally allowed by hearing upon such affidavit of contest, and if the charges contained in the affidavit of contest were true, to have cancelled her entry, and then for the heirs aforesaid, within a time fixed by the land office or Department of the Interior, to consummate and perfect an entry upon the land in favor of the heirs of an original entryman, when there was no widow, under the preference right granted by Congress under said Sections 2291-2 of the Rev. Stat. of the U. S. See *McMichael vs. Murphey*, 197 U. S. 304.”

(Pr. Rec. 84-85.)

No. 4:

“This honorable court in its opinion overlooked the fact that the matter therein referred to as the contest instituted against the entry of one Hollen H. Fearnow by one Lena Barnes, in the lifetime of the said Hollen H. Fearnow, was a proceeding wherein the Assistant Commissioner of

the General Land Office, as shown at pages 42-43 of the record herein, held that there was no jurisdiction acquired over Hollen H. Fearnow, and set aside all proceedings had therein and held his homestead entry intact, which holding was never appealed from and remained the final decision and judgment of the Interior Department upon said question, and that said Hollen H. Fearnow died October 23, 1905, and that contest of Lena Barnes was never revived against his heirs, but was dismissed by her after the death of said Hollen H. Fearnow without further proceedings being had thereon, and this court has thereby overlooked that each and every of the proceedings in said Barnes' contest was immaterial to the issues in the case, because said homestead entry of Hollen H. Fearnow was intact of record, uncanceled and no charge pending against it, except the contest of Lena Barnes, which was subsequently dismissed without the same having been revived against his heirs." (Pr. Rec. 86-87.)

No. 5:

"As a part of this fifth ground, these defendants in error by reference incorporate the foregoing fourth ground, and further say that this honorable court in its opinion at page 11 thereof refers to the fact that Lena Barnes dismissed her contest case aforesaid at the time that Luttie B. Fearnow filed the purported relinquishment and made her homestead entry, and then this court says:

" 'This ground of contest was well known to the defendant herein (meaning Luttie B. Fearnow), and she would have been entitled to avail herself of it as against the heirs if they had attempted to make final proof before the land department as required by Sec. 2291, supra.' "

"And in the above and foregoing connection this court has overlooked the fact that said contest had not been revived against the heirs of Hollen H. Fearnow, as well as overlooked the fact that Luttie B. Fearnow, then claiming to be the widow, was in possession of said land antagonistic to said contest, and that the heirs were not parties to said contest and not bound by any proceedings therein. And this court further overlooked the law that such a defense as was outlined and set forth was not available as against

the heirs aforesaid, who took and acquired their rights to consummate a homestead entry, not by the laws of Oklahoma regulating descent and distribution of estates, but by Secs. 2291-2 of the Rev. Stat. of the U. S., and that such right came to the heirs free from taint or defect which might have been urged against the ancestor in his lifetime, and in the connection overlooked, as did counsel in the case, including ourselves, the following decisions decisive of said question, as follows, to-wit:

“In re White, 1 L. D. 55, wherein it was held:

“‘Notwithstanding that the homestead entry in this case was illegal at its inception on account of alienage of claimant, his widow (who was not an alien) is allowed to purchase under the act of June 5, 1880.’

“In *Dorame Heirs vs. Towers*, 1 Copps. Publ. Land Laws, Vol. 1 (1882), page 438, et seq., after citing Secs. 2290-91-97, Secretary Chandler said:

“‘It is evident from these provisions that the making of the first affidavit is a personal act, binding and responsibility of the applicant alone, and for which no other person can be held accountable or criminally liable if perjury be committed. The death of the party casts whatever of title or estate the statute has created, directly by operation of law, upon, first, the widow; second, the heirs or devisees; and, the substitution being effected, the requirement being effected, the requirement of proof of residence or cultivation attaches to the person or persons succeeding to the right, title or estate.’

“Third syllabus, page 438:

“‘The provisions of Sec. 2291, Revised Statutes, are substantially complied with by continued cultivation by the heirs, personal residence not being required in their case.’

“In re Heirs of Stephenson vs. Cunningham, 32 L. D. 653-4:

“‘Upon the death of the entryman the right to the entry was cast upon the widow; it came to her as a valid, live, subsisting entry, free from any taint or defect on account of the entryman.’

“In *Howe vs. Parker*, 190 Fed. 755, it is said:

“‘But in the case at bar the attempt is to extend the disqualification to a new class of persons (Henry Howe’s heirs) and acts not specified in the statutes and to punish with disqualification an entryman who falls clearly within the qualified classes, described in the statute, because he is alleged to have violated prohibitions which the acts of Congress do not contain. Because any extension of the disqualifications prescribed by these acts to classes not here clearly specified has the like effect as the extension of a penal law to persons and acts not within its terms. The prohibitions and disqualifications of these statutes should be interpreted by the familiar rule that, where the statute is before the event, plain and unambiguous, the courts may not lawfully extend it to a class of persons who are excluded by its terms, nor by interpretation or construction after their commission make acts violations thereof which were not clearly such by the express will of the legislative department when they were done.’ (Citing a host of cases.)

“And further, at page 757, in the same case, the Court of Appeals said:

“‘Henry Howe died June 17, 1893, and his right to his homestead was then granted to his heirs by Sec. 2291, U. S. Rev. Statutes.’

“This court has overlooked this question decisive of this case, which has also been overlooked by counsel herein in this court by reason of the fact that the lower court decided in favor of the heirs, and for the first time there has been brought up specifically in this case by the opinion of the court therein the importance of the acts of Lattie B. Fearnow in regard to the purported relinquishment so far as it affected the rights of the heirs of Hollen H. Fearnow and the method she adapted to clear said record entry, so she could make a homestead entry thereof in her own name, that is to say, this court has overlooked that said Lattie B. Fearnow was bound to know and knew that she was not the wife of said Hollea H. Fearnow at the time she made said purported relinquishment, and that without giving the heirs of said Hollen H. Fearnow any notice of her intention to

relinquish said entry as his widow, she filed said purported relinquishment, well knowing at the time that under the facts and the law applicable thereto it was void, and that she then immediately thereafter entered said land in her own name, thereby segregating said tract of land from the public domain, to which proceeding and each and every part thereof the said heirs were not parties, nor had they any notice thereof, nor had the land office and the Department of the Interior jurisdiction over them at that time, and they were not bound by said relinquishment, nor by any purported rights claimed by the said Luttie B. Fearnow thereunder by reason of no jurisdiction of their person, and the further reason that jurisdiction of the subject matter in the making of the said relinquishment by the said Luttie B. Fearnow was obtained in said U. S. Land Office by the said Luttie B. Fearnow's misrepresenting that she was the widow of Hollen H. Fearnow, and thereby committing a fraud upon said land office and causing it to cancel said entry, thereby depriving the heirs of their day in court on the matter acted upon then and there by the said land office."

(Pr. Rec. 86-87.)

No. 7:

"That the court in its decision herein has overlooked the fact and the law as disclosed by the record herein, that the officers of the U. S. Land Department committed a material error of law, by which as a result thereof the patent to the land in controversy was issued to the wrong party, to-wit, Luttie B. Fearnow, whereas it should have been issued to the heirs of Hollen H. Fearnow, deceased, because of said facts, to-wit: It was made to appear to the U. S. Land Office as well as to the Land Department at Washington, D. C., by the contest affidavit of the said heirs, setting up among other things the facts which showed that said relinquishment was void; that said Hollen H. Fearnow left no widow; that he left the said heirs, which under Sections 2291-92, Rev. Stat. U. S., were granted the absolute right to commute an entry in the name of the heirs of the said Hollen H. Fearnow, deceased, without any taint or defect from the original entry, which might have been urged against Hollen H. Fearnow in his lifetime; and that by the motion of the said Luttie B. Jones and her proceedings to

dismiss the contest brought by two of the heirs of Hollen H. Fearnow, as a matter of law, she admitted the truth of the allegations of said contest affidavit against her, but that the said land office and land department erred as a matter of law, as decided by this honorable court in its former opinion herein (34 Okl. 694), in not sustaining the sufficiency of the allegations of the said contest affidavit and in not ordering a hearing thereon; and that said heirs were entitled to a hearing thereon; and this court has overlooked the further fact in connection with the foregoing that said heirs were erroneously denied a hearing by the said land office and Department of the Interior, and that they did not have said hearing until they brought their action in the Kay County District Court in this case."

(Pr. Rec. 88.)

No. 8:

"This honorable court has also overlooked the fact apparent on the face of the record that the Secretary of the Interior committed a material error of law in not ordering a hearing on the affidavit of contest to determine whether or not Luttie B. Fearnow was or was not the widow of said Hollen H. Fearnow, deceased."

(Pr. Rec. 88.)

No. 9:

"This honorable court further overlooked the fact that the Secretary of the Interior committed a material error of law to determine whether or not the said Luttie B. Fearnow had practiced a misrepresentation and fraud upon the U. S. Land Office and the Department of the Interior in the matter of the purported relinquishment in the matter of the charges preferred against the same, prior to the final proof of Luttie B. Fearnow, as preferred by two of the heirs of Hollen H. Fearnow, by said affidavit of contest, and that by the failure of the U. S. Land Office, the Commissioner of the General Land Office and the Secretary of the Interior to order such hearing and by the subsequent proceedings by the said Land Department, Commissioner of the General Land Office and Secretary of the Interior in said matters and as a result thereof the patent was issued to the wrong party, to-wit, to Luttie B. Fearnow instead of its being issued to

the rightful parties, to-wit, the heirs of Hollen H. Fearnow, deceased, as it would have been under the facts as would have then been made clearly to appear had not said heirs been prevented by said material error of law in dismissing said heirs' contest without a hearing, and thus depriving them of a vested right given them by sections 2291-92 Rev. Stat. of the U. S., without due process of law in violation of the provisions of the Federal Constitution, guaranteeing due process of law and prohibiting any of the Government Departments of depriving any of the citizens of the United States of their property rights, and rights under the Constitution of the United States and the amendments thereto as well as under the Acts of Congress of the United States, without due process of law."

(Pr. Rec. 88.)

No. 10:

"This court has also overlooked the fact that under the decision of this court in this case, 34 Okl. 694, it was held that the validity of the purported marriage of said Luttie B. Fearnow and Hollen H. Fearnow was a question properly before the Department of the Interior which the said Department could decide from the record before it, if said Department had conducted a hearing thereon."

(Pr. Rec. 88.)

No. 11:

"This court has also overlooked the fact that in said prior opinion of this court that in substance it was held that said heirs' affidavit of contest did present grounds, sufficient, if proven, to set aside the purported relinquishment and the subsequent Homestead Entry made possible by the filing of the said purported relinquishment and that said contestants duly preserved their rights before the said Department of the Interior (3rd Syl.)."

(Pr. Rec. 89.)

No. 12:

"This Honorable Court also overlooked the fact and the records in the said foregoing matters that said former decision of this court (34 Okl. 694) in effect held that the heirs of Hollen H. Fearnow had not been guilty of delay or laches,

they having waited only fourteen days after the filing of Luttie B. Jones before filing their contest against her said filing.”

(Pr. Rec. 89.)

No. 13:

“This Honorable Court has also overlooked the fact that said Luttie B. Fearnow did assert, as shown by the record, that she was the widow of Hollen H. Fearnow, which, if true, under the law, gave her the right under Sec. 2291, Rev. Stat. U. S., and thereby the first subdivision of that portion of the syllabus appearing on the second page of the opinion is directly contrary to the record, for without the widow's right she had no right under Section 2291 aforesaid, and that said patent could not ultimately have been obtained by her, if the original entry of Hollen H. Fearnow had not been cancelled by said void and fraudulent relinquishment filed by Luttie B. Fearnow, as aforesaid.”

(Pr. Rec. 89.)

No. 14:

“The decision of this Honorable Court has overlooked the following question of law, to-wit, that the heirs of Hollen H. Fearnow, owing to the said fraudulent acts of the said Luttie B. Fearnow in the matter of her said relinquishment and her immediately entering said land in her own name, prevented the heirs from making their formal final proof pursuant to Sec. 2291, Rev. Stat. of U. S. until they had contested and caused to be vacated and set aside the prior relinquishment aforesaid and the subsequent homestead entry made by said Luttie B. Fearnow. See 173 U. S. 587, *Duluth &c. Ry. Co. v. Roy.*”

(Pr. Rec. 89.)

No. 15:

“This Honorable Court has also overlooked the law in reference to the effect of the so-called speculative nature of the original Homestead Entry of Hollen H. Fearnow and in considering the same as affecting in any way whatever the rights of the said heirs, in that said holding by this court in the last part of the syllabus and in the opinion in support

thereof is contrary to Secs. 2291-92 of the Rev. Stat. of U. S. and to the decisions of the United States Supreme Court construing said sections."

(Pr. Rec. 89.)

No. 16¹:

"This Honorable Court, on page 11 of its opinion, in citing 32 Cyc. 806, and *Watts v. Amos*, 14 Okl. 178, and *Gallagher v. Caldwell* (Wash.), 18 Pac. 68, states a proposition that as applied by the cases covered by the said citations, as an abstract proposition will not be disputed, but by reference to the cases above referred to, it will be seen that the facts in those cases were not analogous to the facts in the case at bar on the question of the rights conferred on the heirs of a deceased entryman where the entry is made after the death of the original entryman. *Prosser v. Finn*, 208 U. S. 67, cited in support of 32 Cyc. 608, was a case between the original entryman and where no question of Secs. 2291-92, Rev. Stat. was involved. Indeed in that case the court said:

" 'That the principle was well settled that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee for the true owner,' citing many cases.

"It would seem that the court has overlooked the cases cited by the U. S. Supreme Court in the case of *Prosser v. Finn*, *supra*, because the case of *Bernier v. Bernier*, 147 U. S. 242, is cited in support of our contention here. And the cases of *Watt v. Amos*, *supra*, and *Gallagher v. Caldwell*, *supra*, are cases in which the disqualification of the entryman was urged against him while he was alive and not against his heirs after his death, and are not analogous in other respects."

(Pr. Rec. 90.)

No. 15²:

"This Honorable Court has overlooked the fact and the law that the effect of the judgment it directs and enters herein against the heirs of Hollen H. Fearnow is in violation of Article 1, Sec. 10 of the Federal Constitution, which provides that 'no state shall * * * pass any bill of attainder.'

"This Honorable Court has overlooked the fact that the effect of this decision is to violate Secs. 2291-92, of the Rev. Stat. of U. S., and each of them in nullifying the rights cast thereunder in favor of the heirs of Hollen H. Fearnow to consummate an entry as stated by the Secretary of the Interior in *Heirs of Stevenson v. Cunningham*, 32 L. D., where in a case between the widow and a protestant, it was held that 'upon the death of the entryman the right to entry was cast upon his widow; it came to her as a valid, live subsisting entry, free from any taint or defect on account of the default of the entryman.'"

(Pr. Rec. 90.)

No. 19:

"This court has overlooked that portion of the record showing that at the time of Hollen H. Fearnow's death the entry made by him was intact upon the records of the U. S. Land Office and that the Barnes' contest was never revived nor succeeded by said Barnes by any subsequent contest against the heirs, nor was any notice issued and served therein upon said heirs (see pages 31-33, 8-9-10 of Rec.) and in connection therewith overlooked the law as declared in *Parker v. Howe, supra*, that under such circumstances the contest and the proceedings had thereunder were of no effect whatever against the grant to the heirs under Sec. 2291 of Rev. Stat. U. S."

(Pr. Rec. 92.)

No. 20:

"This court has overlooked the fact that the Entry of Hollen H. Fearnow, never having been legally relinquished by any party who had a right to relinquish it, remained and was in force upon said premises at the time of the pretended filing thereof of said Luttie B. Fearnow, and that therefore her filing was a mere nullity as decided by this court in the case of *McMichael v. Murphy*, 12 Okl. 155, 70 Pac. 189; and has overlooked said controlling decision upon said point. See 32 Cyc. 808. And said filing of said Luttie B. Fearnow, being a nullity, all subsequent proceedings thereon are mere nullities and she could acquire no rights in said premises as against the rights of the said heirs of Hollen H. Fearnow therein."

(Pr. Rec. 92.)

No. 21:

"This Honorable Court has by its reversal of the judgment and decree of the trial court and directing a final judgment in this cause erred, and thereby this court as the highest court of the State of Oklahoma upon the undisputed facts of the case shown by the record before it, instead of affirming the judgment of the trial court, directed an erroneous decree against these defendants in error, and so doing contrary to the provisions of Secs. 2291-92 of the U. S. Rev. Stat. and Art. 1, Sec. 10 of the Federal Constitution and to a long line of decisions of the Land Department of the United States construing said Sec. 2291, and to a long line of decisions of the Federal courts, including the Supreme Court of the U. S., construing said Sec. 2291 and the principles, practices and usages followed by the courts of equity of the United States in the matter of actions of charging a legal title under a patent from the United States and under decisions of the Land Department of the United States upon which such patent was based, with a trust in favor of the rightful owner of the equitable title to the land on account of an error of law or a gross mistake of fact, or a fraud upon the officers of the U. S. Land Office or of the Land Department by which the heirs were prevented from establishing their rights to the patent issued to another; and the decision of the court herein is contrary to the laws of the United States and a proper interpretation thereof, for that the ownership of the real estate in question rests upon the laws of the United States and correct interpretation thereof; and the decision of this court herein is contrary to the laws of the United States in deciding that a patent by the United States to a person, not the widow or devisee or an heir of the deceased homestead entryman, where at the time of his decease his entry was intact of record and final proof thereunder had not been made by him, was superior to the grant conferred by Congress under Sec. 2291 of the Rev. Stats. U. S. upon the heirs of such decedent, where there was no widow or devisee; and that too, in the instant case, where the patentee by misrepresentation that she was the widow, fraudulently induced the U. S. Land Office to permit her to relinquish the original entry aforesaid and concurrently therewith or immediately thereafter to enter under Sec. 2289, U. S. Rev.

Stats., said land as a mere qualified entryman, upon which said heirs were erroneously denied the right to contest the cancellation of said original entry by said void relinquishment and concurrent entry by said patentee; and the decision of this court herein instead of affirming the trial court, it erroneously reversed it and directed it to enter judgment for plaintiff in error, thereby affirming the erroneous action of the officers of the said local land office in the matter of said relinquishment and consequent cancellation of original entry and immediate subsequent entry of the land by the party who fraudulently procured and induced said officers to permit said relinquishment and subsequent entry to be made and by such decision by this court herein, deprived and to deprive these defendants in error of their vested right and grant under said Sec. 2291, to said land, contrary to and in violation of the provisions of the Federal Constitution and of Article 14 of the amendments thereto against depriving such parties of such grants, property and rights, without due process of law and against impairing the heirs' rights under said grant, in that said heirs were not parties to such relinquishment and cancellation and had no notice or knowledge thereof until after made, as aforesaid, when they, within fourteen days thereafter, filed contest against same and against said concurrent entry made at the time said Luttie B. Fearnow made it as aforesaid, and which this court heretofore decided as the law of this case was sufficient to protect their rights in the premises."

(Pr. Rec. 92-94.)

No. 22:

"This Honorable Court has overlooked the undisputed fact upon the face of the record herein, that all acts necessary to consummate the title to the said land in the heirs under Sec. 2291 of the U. S. Rev. Stats. has been done except the formal making a final proof by the said heirs under the said Sec., and the court and all the counsel herein have overlooked an unbroken line of decisions by the United States Supreme Court, including the case of *Ard v. Brandon*, 156 U. S. 537, and *Ard v. Pratt*, 155 U. S. 537, reversing 43 Kan. 419, 425, which went to the U. S. Supreme Court from the Kansas Supreme Court, holding, in effect, as applicable herein, that where by the acts of the patentee or of

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the land officials, the heirs were prevented from making final proof, their omission in making final proof should not work to their prejudice, but in their favor in a suit in equity to declare a resulting trust. And this court has overlooked the familiar principle of law that where a tract of land is covered by a homestead entry intact of record, whether contested or not, no person except the entryman can make final proof or make another entry of the tract, unless and until such entry of record is legally relinquished or cleared in some way, hence, the heirs could not have made entry until the Barnes contest was formally dismissed; and it appearing that Luttie B. Fearnow's entry, the said void and fraudulent relinquishment and the dismissal of the Barnes contest occurred simultaneously, in law there never was an opportunity for the heirs to attempt to avail themselves of their grant under said Sec. 2291, *supra*, until immediately after Luttie B. Fearnow fraudulently had acted as above, thereby preventing the heirs, and which was brought to the attention of the land officials within fourteen days after the first opportunity to assert their rights, and by the said officials denied their day in court thereon."

(Pr. Rec. 94.)

No. 23:

"This Honorable Court has overlooked the fact that in the former decision in this case, 34 Okl. 694, this court settled the law of the case as to the sufficiency of the heirs' petition to declare a resulting trust and the sufficiency of the facts therein pleaded by overruling the demurrer to the petition, reversing the trial court and remanding the cause; and has overlooked the question of law therein at pages 699-700, decisive of one of the fundamental bases of this case, to-wit:

"The next proposition stated by counsel for the defendants (Luttie B. Jones and the Mtg. Co.) is that even though the marriage is void, its validity cannot be inquired into in this proceeding to declare a trust. If this were true it would follow that the woman, notwithstanding the fact that she was not the lawful widow of Fearnow, could keep this land without the fact of her relation to him being inquired into by any tribunal. The land office has declined to make inquiry into the fact, and if the court likewise

refuse, then the heirs who are in law entitled to the estate, would be deprived of it without having their day in court.'

"And thereby such decision of the Land Department, which, in effect, is the last decision of the court herein now complained of, deprives the said heirs of their day in court contrary to the provisions of the Federal Constitution and of Art. XIV of the Amendments thereto, prohibiting the deprivation of such right, in that they had no hearing upon, nor notice of, said void relinquishment being offered or proposed to be offered until after it was used illegally to cancel the deceased entryman's entry upon the record and were then denied a hearing on their contest prior to final proof by the pretended widow and were not permitted to establish the truth of their charges against the said relinquishment. And, in the instant case, this court, by overlooking the above proposition and the facts admitted and established upon the trial in the lower court upon the second trial therein, has erroneously upon such facts misapplied the law and rendered a final judgment contrary to the law, said admitted facts showing the truth of the allegations of said charges against said relinquishment, viz: That Luttie B. Fearnow was not the widow, and hence, under the law she knowingly used said relinquishment to deprive said heirs of their right and property aforesaid. Which judgment depriving said heirs of their rights and property aforesaid, practically nullifying and making void that portion of Art. VI of the Federal Constitution, whereby 'said constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or the laws of the state to the contrary notwithstanding.' That is to say, the decision herein complained of deprives, as above stated, the rights and property of the above heirs, under said law of the United States, as aforesaid, to-wit, Sec. 2291 of Rev. Stat. of the U. S.

"Wherefore, these defendants in error pray that a rehearing of said cause may be had by your Honorable Court; that oral argument be allowed and leave to file additional brief; that upon such rehearing the decision of Feby. 8th be withdrawn, and the decree of the trial court be affirmed, and any other proper relief which to the court may seem

legal and proper. (See motion appended hereto for oral argument, as part hereof.)

“L. A. MARIS,

“MILTON BROWN,

“*Counsel for Defendants in Error, other than
Phoenix Mutual Life Insurance Company.*”

(Pr. Rec. 95.)

Denial of petition for rehearing:

“Supreme Court, January Term, 1916, April 4th, 1916,

Forty-fourth Judicial Day.

“5978. Luttie B. Jones et al. vs. Emily F. Fearnow et al.

“And now on this day it is ordered by the court that the petition for rehearing filed herein on February 23, 1916, be, and the same is hereby overruled.

“13th Subdivision.

“In the Supreme Court of the State of Oklahoma.

“No. —. Luttie B. Jones et al., Plaintiffs in Error, vs. Emily F. Fearnow et al., Defendants in Error.

“ORDER.

“Now on this the 4th day of April. A. D. 1916, said above entitled cause came on for further disposition, and the court hands down its final order denying and overruling the petition of the defendants in error for a rehearing in this cause in this court; whereupon said defendants in error except thereto and also except to the decision sought to be reviewed by said petition for a rehearing, which several exceptions were severally allowed by the court for the purpose of a review thereof in the United States Supreme Court.

“Approved.

M. J. KANE.

“*Chief Justice of the Supreme Court of Oklahoma.*

“Endorsed: No. 5978. In the Supreme Court of the State of Oklahoma, Luttie B. Jones et al. vs. Emily F. Fearnow et al. Order. L. A. Maris and Milton Brown, Attys. for Defendants. (Filed Apr. 10, 1916. William M. Franklin, Clerk.)”

(Pr. Rec. 9.)

Extracts from the assignments of error filed with the petition for the writ of error herein:

Each of said assignments to begin or end with the phrase "that the said State Supreme Court being the highest state court in said State in which said matter could be tried and finally determined in said State," and in substance stating that the decision and decree of the said State Supreme Court, reversing a decree by the trial court awarding the real estate to plaintiffs under Sec. 2297, U. S. Stats., and entering a decree in favor of the defendants was in violation of the provisions of the Federal Constitution on due process of law, denying to plaintiffs a hearing or day in court in the Land Department as to their rights under Sec. 2291, U. S. Stats., denying them their day in court on the matter that under the admitted facts Luttie B., aforesaid, was not, and never had been, and never could be the wife or widow of said Hollen H. Fearnow, denying them a day in court on the voidness and illegality of the relinquishment of the latter's homestead entry by the said Luttie B., as his widow—when she was not, and the illegality of her personal simultaneous homestead entry thereof were each and all contrary to the provisions of the Federal Constitution and the amendments thereto guaranteeing to the citizens of the United States their day in court, their rights under the Acts of its Congress, and taking their property from them without due process of law, etc. To repeat herein the exact language of pages — to 121 of the printed transcript of record herein containing the assignments of error filed in this court with the writ of error is uncalled for at this time.

* * * * *

In re—Prompt Prosecution of this Error Proceeding

(1) Case finally decided in Oklahoma Supreme Court on the petition for rehearing therein April 4, A. D. 1916. Printed record, pp. 99-100.

(2) Writ of error granted, allowed and issued May 18, A. D. 1916 Per Rec. p. —

(3) Error bond given May 18, A. D. 1916. Citation, May 18, 1916, served May 19, 1916, per Rec. p. 123.

(4) Transcript of record, etc., lodged in U. S. Supreme Court July 13, 1916. Pr. Rec. cover.

(5) The printed "points" are printed again in answer herein.

(6) Transcript printed here. Dec. 4, 1916.

No delay whatever by the heirs—the only delay was by the frivolous proceedings by the purported widow in attacking the decision of the Kay County District Court.

IN RE: Upon the proposition that this Court has never decided in favor of the contention of the defendant, Luttie B. Jones et al. and has always decided against such condition—hence "frivolousness" not chargeable against "the heirs at law" and "beneficiaries" of Revised Statutes of United States, Section 2291, and that the charge of such "frivolousness" is chargeable against defendants in error for appealing from the judgment of the trial court against them upon the undisputed facts and the "settled law of the case" laid down in *Fearnow v. Jones et al.*, 34 Okl. 694.

Neither was there any delay in the heirs asserting their rights after Hollen H. Fearnow's death.

Hollin H. Fearnow died on the — day of October, 1905. (Agreed facts, pr.Rec. 47.)

At that time Lena Barnes' contest against his entry was pending after the remand by Commissioner Fimple. (Pr. Rec. 48.)

By the joint action of Lena Barnes and Luttie Jones the land was kept segregated until November 28, 1906, when they clandestinely, with no notice to the heirs, by the erroneous acts of the U. S. Land Office, cleared the records of Barnes' contest and the erroneous Barnes' entry, immediately, regardless of the rights of said heirs under Sec. 2291, U. S. Rev. Stats., permitted the pretended widow—when she was not a widow—relinquish the Hollen H. Fearnow entry, as his widow, and to erroneously again segregate the tract, by permitting said Luttie B. Jones to enter the same as a homestead entry, all of which was done without notice to the heirs; then the heirs within a few days brought their con-

test to clear the record of said erroneous relinquishment and the illegal homestead entry by Luttie B. Jones and it pended in the local land office and commissioner's office and before the Secretary of the Interior until the 1st day of September, 1907, when, upon the undisputed facts and the law applicable thereto, Luttie was not the widow of Hollen, the Land Department erroneously held that it could not inquire into that matter because no decree of court had established the admitted illegality, and voidness of the purported marriage and it had no jurisdiction to inquire into the qualifications of Luttie to relinquish (as widow) the Hollen H. F. entry and therefore dismissed the contest by the heirs; thereafter, the patent was issued to Luttie B. for the land, and within a few days thereafter this suit was begun in the Kay County District Court of Oklahoma. (Pr. Rec. 48-49.)

No delay whatever by the heirs; the only delay being that occasioned by the illegal and void acts of said Luttie in conjunction with the above erroneous proceedings and rulings in the local U. S. Land Office, and in the Land Department and before and by the Secretary of the Interior, thereby hindering and preventing the heirs from their rights.

“SPECULATIVENESS” No ISSUE.

At the time of Hollen's death on October —, 1905, there were no charges pending against his homestead entry for the Barnes contest was ordered dismissed by Assistant Commissioner Fimple on January 20, 1905, and no appeal therefrom. (Pr. Rec. 48.)

Besides, Assistant Commissioner Fimple in Hollen's lifetime had reversed the local office in its decision in the Barnes contest, holding that the local office had no jurisdiction to make said decision and that upon the showing Hollen made he had a complete defense against the Barnes contest. (Pr. Rec. 43, 55.) He died and no revivor of the contest.

The Supreme Court of Oklahoma in 34 Okl. 694, upon demurrer, held there was no laches against the heirs. Neither subsequent pleading or proof brought forth nothing on any claim of “laches.” And the final trial upon the undisputed facts properly adjudged in favor of the heirs.

There was no evidence on the question of "fraud" and "speculativeness," beyond that the Barnes contest had been made on certain grounds and that the mother of Hollen and he had a conditional agreement about the entry, which statement was also stipulated to be considered with the pleadings and exhibits, and which statement, when so considered in connection with Commissioner Fimple's decision, shows that the deceased Hollen before his death made under oath a showing of a complete defense against said charges; no appeal was taken by any one from Commissioner Fimple, nor was any jurisdiction thereafter obtained and the charges were abandoned by Lena Barnes, the contestant. His defense under oath was never refuted and he died a year or so thereafter—too late for a stranger, under above circumstances, to challenge the sworn statements of a man whose lips are sealed in death.

ARGUMENT.

A "FEDERAL QUESTION" IS INVOLVED.

"Where defendant sets up the claim that it enjoys right or privilege sought to be enforced under authority of an Act of Congress and the State Court denies the right, the judgment is reviewable here under Sec. 237 of the new Judicial Code (Sec. 709, Rev. Stat.)." 225 U. S., 246, *Creswill v. Grand Lodge K. of P.*

The propositions upon which the "Federal Questions" arose were set up in the State Court and in 34 Okl. 594, and in the trial in the Kay County District Court following 34 Okl., *supra*, it was decided that said heirs were entitled to the patent from the U. S. by reason Section 2291 U. S. Rev. Stats., and that the patentee held the land in trust for the heirs, notwithstanding the Land Department denied the heirs a hearing and construction of said Section 2291, and that to hold otherwise would be to deny the heirs their day in court. Later in the last decision of the Oklahoma Supreme Court, unpublished except in 156 Pac. 309, upon a premature and void order of remand, it held that Sec. 2291, U. S. Stats. was immaterial, contrary to all the decisions of this court on cases involving the principle in that it was admitted as a fact in the State Court, that the pretended widow relinquished the entry of the deceased entryman Hollen H. Fearnow as his widow, whereas, under the law upon the admitted facts it was held that she was not his widow; (see 34 Okl. 697-701.) thus in the later opinion misconstruing Sec. 2291, *supra*, upon the admitted fact of her having as a widow, *when she was not*, relinquished the Hollen H. F. entry without right or notice to his heirs. Thus, by its last decision the Oklahoma State Supreme Court adjudicated against the Federal right of the heirs set up in the case, to-wit, the heirs had been denied their day in court in the Land Department to therein establish their right under Sec. 2291 U. S. Rev. Stats. to the preference right to make and consummate an entry of the land embraced in Hollen's entry and thereunder entitled to the patent from the United States. Wherefore the motion to dismiss the writ of error and to affirm the judgment of the Supreme Court of Oklahoma should be denied and to the contrary the judgment of the State Su-

preme Court should be reversed with an order to affirm the judgment of the Kay County District Court or that this Court enter decree of the affirmance of the Kay County District Court for that under the undisputed facts and the provisions of Section 2291, U. S. Statutes, the heirs were entitled to the land and were prevented from the performing of the formal acts required of it prior to patent solely by the unlawful and void acts and proceedings of said pretended widow and by the mistakes of law committed by the U. S. Land Officials upon unprinted facts, and for that the judgment and decree of the Kay County District Court of Oklahoma on said undisputed facts was correct and according to said Act of Congress. Section 2291, U. S. Stats. and the decisions of this Court construing same.

Respectfully submitted,

Oklahoma City, Okla
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“IN THE SUPREME COURT OF THE UNITED STATES.

“OCTOBER TERM, 1916.

“Emma F. Doepel et al., Heirs at Law of Hollin H. Fearnow, Deceased, Plaintiffs in Error, vs. Luttie B. Jones, Elmer Jones and The Phoenix Mutual Life Insurance Company, Defendants in Error. No. 571.

“On writ of error to the Supreme Court of Oklahoma.

“Motion by Doepel et al., for judgment.

“*Motion on behalf of Emma F. Doepel et al., heirs at law of Hollen H. Fearnow, Deceased, plaintiffs in error to reverse (under the hearing of the motion of said Jones et al. to dismiss, etc.) the Supreme Court of Oklahoma and to the contrary upon said hearing of the motion to dismiss aforesaid, to not only reverse said Supreme Court of Oklahoma, but upon the hearing now before the Court herein that the Honorable Supreme Court of the United States affirm the judgment of the District Court of Kay County, Oklahoma, following the former opinion of the Supreme Court of Oklahoma in Fearnow et al. v. Jones, 34 Oklahoma 694 (opinion by Judge C. B. Ames), for that the questions on which the decision of the cause depends when we take into consideration the admitted facts in the case and the law when properly applied thereto, as shown on the face of the record herein, show that the judgment and decree by said trial court in favor of the trust for the benefit of said heirs at law and against the purported widow and her mortgage was correct and in harmony with the decisions of this Honorable Court, and that the contention of said defendants in error contrary to the decisions of this court thereon, are so frivolous as to not need further argument, and that upon the undisputed facts and the law properly applied thereon, these plaintiffs in error are entitled as a matter of right and law to an order, direction and judgment of this Court reversing the last decision and decree of the Supreme Court of the State of Oklahoma, and also entitled to a judgment of affirmance of the Kay County District Court of Oklahoma decreeing in substance that the plaintiffs in error herein are the sole and only heirs of Hollin H. Fearnow, deceased, the homestead entryman mentioned in plaintiff's petition, that the plaintiffs in error and the said R. C. Fearnow are the owners in fee*

simple of the premises involved, to-wit, the Southwest Quarter of Section Eleven, Township Twenty-six North of Range One, East of the Indian Meridian in Kay County, Oklahoma, and that the defendant, Luttie B. Jones, holds the legal title in trust for the said owners thereof, fixing the separate interests of said owners and adjudging and ordering the defendant Luttie B. Jones and Elmer Jones, her husband, to make a sufficient deed conveying said premises to said owners, and further adjudging and decreeing that a mortgage in said land given by said Luttie B. Jones and her husband, Elmer Jones, *prior to the patent for said land*, and of record in the office of the Register of Deeds of said county, in the name of said Insurance Company does not constitute any lien or incumbrance upon said premises and cancelling said mortgage and setting aside and holding to for naught, together with a judgment for costs in favor of said plaintiffs against the said defendants, Jones and Jones and said Insurance Company, and furthermore that under the undisputed facts and the law properly applied thereto as shown upon the face of the records in this cause now before this Court, the decision and decree last made by the Supreme Court of Oklahoma directing a different decree than said trial court resulted from a misconstruction by the Supreme Court of the State of Oklahoma of Section 2291 of the Rev. Statutes of the United States, erroneously applied to the undisputed facts of record in the case as immaterial, as shown by the transcript of record herein.

“Respectfully submitted,

“MILTON BROWN,

“*Counsel for Plaintiffs in Error.*

“L. A. MARIS,

“CODY FOWLER,

“*Solicitors for Plaintiffs in Error.*

“P. O. Addresses: Milton Brown, 809-811 American Natl. Bank Bldg., Oklahoma City, Oklahoma; L. A. Maris, Ponca City, Kay County, Oklahoma; Cody Fowler, 400 Insurance Bldg., Oklahoma City, Okla.”.

NOTICE

To the above named defendants in error and to J. F. King, Esq., their counsel herein:

Please take notice that on the 9th day of April, 1917, at the opening of the court, or as soon thereafter, when the above cause shall be submitted to the Supreme Court of the United States for the decision of the court therein upon your motion to dismiss the writ of error and to affirm the last opinion and decree rendered by the Supreme Court of Oklahoma and to deny further argument of the case, that, then and there the motion, of which the foregoing is a copy, to reverse the State Supreme Court of Oklahoma, and to affirm the decree of the District Court of Kay County, of the State of Oklahoma, will then and there be submitted.

That in support of the foregoing motion to reverse the State Supreme Court and to affirm the decree of the trial court there will be submitted the appended abstract of such portions of the printed transcript of record herein as are pertinent to the consideration of said motions and answer for the plaintiffs in error herein.

MILTON BROWN,
Counsel for Plaintiffs in Error.
L. A. MARIS,
CODY FOWLER,
Solicitors for Plaintiffs in Error.

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DOEPEL ET AL., HEIRS AT LAW OF FEARNOW, v.
JONES ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 571. Argued May 8, 1917.—Decided June 4, 1917.

A preliminary homestead entry, made in the Territory of Oklahoma under agreement between the applicant and his mother that he would make the entry, pay rent for the land while the entry was being completed and deed the land to her upon the issuance of patent, is absolutely void under § 24 of the act providing a temporary government for that Territory, etc. (Act of May 2, 1890, c. 182, 26 Stat. 81), and confers no rights upon the applicant or his heirs.

When such an entry, because of the illegal agreement, has been provisionally cancelled by the Land Department during the entryman's lifetime, and, after his death, one claiming to be his widow has relinquished her rights therein and made a new entry independently, in her own right, the original entry can afford no basis for the entryman's heirs to contest the widow's entry before the Department upon the ground that her marriage was void, if they do not deny the illegal agreement or seek to have the original entry re-instated on its merits.

The first entry, being a nullity, could beget no equity entitling the heirs to affix a trust to the land when patented to the widow.

156 Pac. Rep. 309, affirmed.

It is sought upon this writ of error to reverse a judgment which sustained the validity of a patent issued by the United States to the defendant in error, Luttie B. Jones, under the homestead laws. The controversy originated in a suit brought by the plaintiffs in error charging that the Land Department had without warrant of law overruled contests which they had filed against the right of the defendant in error to take the land under the homestead law and that therefore she held the patent for the same in trust for their benefit.

The facts stipulated or shown by documentary evidence as to which there is no dispute, are these: Hollen

H. Fearnow being qualified to make a homestead entry, applied in 1899 to make such entry in his own name. Before making the application he had agreed with his mother, for a promised consideration, that he would make the entry, comply with the homestead laws and pay rent for the use of the land in the meanwhile, and that when the patent was issued it would be for her and not for his account and he would deed the land to her. About two years after the entry was made a marriage ceremony was performed between the applicant and Luttie B. Fearnow and they lived together as husband and wife and resided on the land. Some years later after the marriage ceremony and before final proof or patent, Lena Barnes instituted in the local land office a contest against the right of Fearnow to make the homestead entry. This contest was based upon the fact that the agreement which we have stated had been made and upon the charge that under the law of the United States it absolutely disqualified him from making the entry. In December, 1903, after a hearing in the local land office the contest was sustained, the application by Fearnow was cancelled and an entry by Barnes under the homestead law was allowed. This order was taken for review to the Commissioner of the General Land Office and in January, 1905, on the ground of an irregularity or deficiency of notice in the contest proceeding the order was reversed and the local land office was directed "to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days' notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690 [the Barnes entry] which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. 10171 [the Fearnow entry] reinstated."

Ten months after this order the entryman, Fearnow, died, it not appearing that in the intervening time any

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further steps were taken concerning the reinstatement of his homestead entry, and after the elapsing of more than a year from his death the entry-woman, Barnes, dismissed her contest and relinquished her homestead entry. On the same day, November 26, 1906, Luttie B. Fearnow, as the widow of Fearnow, filed a relinquishment of his homestead entry and on that day also made her own application to enter in her own individual right the land as a homestead and this application was allowed. The following month the plaintiffs in error, asserting themselves to be the heirs of Hollen H. Fearnow, and as such entitled under the law to the benefits of his homestead entry and to complete the same, contested the application of Luttie B. Fearnow on the ground that she was not his widow and not entitled to the land as such because she bore such a relation of consanguinity to her alleged deceased husband as to cause the pretended marriage relation between them to be incestuous under the laws of Oklahoma where the land was situated as well as under the laws of Kansas where the marriage between them purported to have been celebrated. The local land office rejected the contest following previous decisions of the Land Department holding that the question of the existence of a marriage was one for judicial cognizance and until its nullity was declared or found by a competent court the marriage was binding on the Land Department. The Commissioner of the General Land Office in reviewing, recited the previous facts as to the Barnes contest, the action taken upon it, the cancellation of the Fearnow homestead entry, the setting aside of the contest proceeding and the order made in it and affirmed the action on the authorities which the local land office had relied upon. In reviewing and sustaining this action on appeal the Secretary of the Interior decided that the subject matter of the marriage and its nullity was not primarily cognizable in the Interior Department. Independently of this, however, his

action was placed in addition on distinct and different grounds, as follows:

"But independent of this contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right it would be necessary to reinstate that entry and to show that it was improperly cancelled not by reason of any technical objection in the procedure, but upon its merits. Furthermore their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry."

The consequence was to definitely reject the contest and affirm the right to enter of Luttie B. Jones, she having in the meantime remarried, and on the making of final proof and compliance with the legal requirements a patent for the land to her issued in March, 1909. This suit, as we have said, was then begun for the purpose previously stated, the basis of the relief being substantially the claim which had been pressed in the controversy in the Department.

Mr. Samuel Herrick, with whom *Mr. Milton Brown*, *Mr. L. A. Maris* and *Mr. Cody Fowler* were on the briefs, for plaintiffs in error.

Mr. J. F. King, with whom *Mr. W. P. Hackney* and *Mr. L. D. Moore* were on the brief, for defendants in error.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It cannot be seriously disputed that if the agreement was made by Fearnow, the original applicant, that he

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would make the homestead entry not for himself but for the benefit of another, would during the time that he was apparently taking the steps to complete the entry pay rent for the land to such other person and when the patent was issued deed the land to such person, such agreement caused that entry to be absolutely void for repugnancy to § 24 of the Act of Congress of May 2, 1890, c. 182, 26 Stat. 81. But as it was expressly stipulated that the facts as to such agreement were true, it must follow necessarily that the entryman derived no right from his entry and transmitted none to his heirs and vested them with no right after his death to complete that which was not susceptible of being completed.

Moreover as it is not disputable that the Land Department in its final ruling against the contestants placed its action upon the prior cancellation of the homestead entry because of the particular agreement referred to which was the basis of the Barnes contest, it must necessarily result that there is an absence of the essential foundation upon which alone the asserted rights of the plaintiffs in error could possibly rest. But putting this latter view aside, we are of opinion that the court below was clearly right in holding that as the facts were admitted which absolutely destroyed the effect of the original Fearnow homestead entry and therefore caused it to be impossible for that entry to be the generating source of rights in favor of the plaintiffs in error, no equitable rights arose in their favor growing out of the cancellation of that entry and the issue of the patent to the defendant in error. It seems superfluous to reason to demonstrate that no equitable right to hold the patentee as a trustee could possibly arise in favor of the plaintiffs in error since the application to enter upon which they rely was in legal contemplation non-existent and hence could afford no basis for equitable rights of any character.

Affirmed.